(9)

No. 99-1551-CSX Title: Semtek International Incorporated, Petitioner
v.
Lockheed Martin Corporation

Docketed: March 22, 2000 Court: Court of Special Appeals of Maryland

Entry	Date	Proceedings and Orders
	Mar 20 2000	Petition for writ of certiorari filed. (Response due May 21, 2000)
	Apr 6 2000	Order extending time to file response to petition until May 21, 2000.
	May 19 2000	Brief of respondent Lockheed Martin Corporation in opposition filed.
	May 30 2000	DISTRIBUTED for Conference of June 15, 2000
	May 31 2000	Reply brief of petitioner Semtek International Incorporated filed.
	Jun 19 2000	REDISTRIBUTED for Conference of June 22, 2000
	Jun 26 2000	Petition GRANTED. SET FOR ARGUMENT December 5, 2000. **********
	Aug 1 2000	Order extending time to file petitioner's brief on the merits to and including August 25, 2000. Order extending time to file respondent's brief on the merits to and including October 10, 2000. A reply brief, if any, is due on or before November 9, 2000.
	Aug 22 2000	Order extending time to file Joint Appendix to and including September 8, 2000.
	Aug 25 2000	Brief of petitioner Semtek International Incorporated filed.
	Sep 12 2000	Joint appendix filed.
	Oct 10 2000	Brief of respondent Lockheed Martin Corporation filed.
	Oct 10 2000	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
	Oct 13 2000	Record filed.
	Oct 24 2000	CIRCULATED.
	Nov 9 2000	Reply brief of petitioner Semtek International Incorporated filed.
	Dec 5 2000	ARGUED.

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Supreme Court, U.S.
FILED

NO. 99- 991551 MAR 20 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,

Petitioner,

v.

LOCKHEED MARTIN CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

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113pp

QUESTIONS PRESENTED

In a suit by petitioner brought against respondent in a California state court, respondent removed the case to federal court on the basis of diversity jurisdiction and obtained a dismissal on the ground that the California statute of limitations had run. Petitioner then brought the present suit against respondent in a state court in Maryland — a state whose relevant statute of limitations had not yet run. Rejecting petitioner's argument that this Court's decisions (especially *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874), and *Hancock National Bank v. Farnum*, 176 U.S. 640, 644-45 (1900)), required the Maryland court to follow California preclusion law (which would not impose a res judicata bar to the Maryland action), the Maryland state courts looked only to federal law and interpreted that law as requiring dismissal of the action on the basis of res judicata. The questions presented are:

1. Is this Court's holding in *Dupasseur* — that the res judicata effect of the judgment of a federal court sitting in diversity "is such as would belong to judgments of the State courts rendered under similar circumstances," and that "no higher sanctity or effect can be claimed," 88 U.S. at 135 — still good law?

2. If *Dupasseur* is overruled or modified by this Court, what should be the res judicata effect of a statute of limitations dismissal in a federal court diversity suit?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Semtek International Incorporated has no parent corporation. No publicly held company owns any of its stock.

TABLE OF CONTENTS

RULE 29.6 CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULE, INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 8

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE LOWER COURTS OVER WHAT LAW GOVERNS THE RES JUDICATA EFFECT OF A FEDERAL DIVERSITY JUDGMENT 8

II. IF *DUPASSEUR* IS MODIFIED OR OVERRULED, THIS CASE PRESENTS THE FURTHER QUESTION OF THE APPROPRIATE RULE GOVERNING THE RES JUDICATA EFFECT OF A STATUTE-OF-LIMITATIONS DISMISSAL OF A FEDERAL COURT DIVERSITY CASE 24

CONCLUSION 30

TABLE OF AUTHORITIES

CASES: **PAGE:**

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir.), *cert. denied and appeal dismissed*, 423 U.S. 908 (1975) 17, 21
Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987) 26
Agostini v. Felton, 521 U.S. 203 (1997) 13
Alcantara v. Boeing Co., 705 P.2d 1222 (Wash. App. 1985) ... 23
American Home Assurance Co. v. International Ins. Co., 641 N.Y.S. 2d 241 (App. 1996) 23
American Motorists Ins. Co. v. General Host Corp., 946 F.2d 1482 (10th Cir.), *vacated in part*, 946 F.2d 1489 (10th Cir. 1991) 20
Andes v. Paden, Welch, Martin & Albano, P.C., 897 S.W.2d 19 (Mo. App. 1995) 23
Answering Service, Inc. v. Egan, 728 F.2d 1500 (D.C. Cir. 1984) 22
Apparel Art International, Inc. v. Amertex Enterprises Ltd., 48 F.3d 576 (1st Cir. 1995) 14
Austin v. Super Valu Stores, Inc., 31 F.3d 615 (8th Cir. 1994) .. 19
Avondale Shipyards, Inc. v. Insured Lloyd's, 786 F.2d 1265 (5th Cir. 1986) 17
Baker v. General Motors Corp., 118 S. Ct. 657 (1998) 3
Bates v. Union Oil Co., 944 F.2d 647 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992) 20
Bauserman v. Blunt, 147 U.S. 647 (1893) 26
Benetton S.p.A v. Benedot, Inc., 642 So.2d 394 (Ala. 1994) ... 23
Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971) 12
Brooks v. The Arlington Hosp. Ass'n, 850 F.2d 191 (4th Cir. 1988) 17
Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958) 15
Campbell v. Haverhill, 155 U.S. 610 (1895) 26
Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978) 18
Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343 (2d Cir. 1995) 16

CASES: **PAGE:**

Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498 (11th Cir. 1990) 21
City of Rolling Meadows v. National Adv. Co., 593 N.E.2d 551 (Ill. App. 1991), *cert. denied*, 507 U.S. 960 (1993) 23
Coker v. Basic Media, Ltd., 303 S.E.2d 620 (N.C. App. 1983) .. 24
Collins v. E.I. Dupont de Nemours & Co., 34 F.3d 172 (3d Cir. 1994) 16
Columbia Cas. Co. v. Playtex FP, Inc., 584 A.2d 1214 (Del. 1991) 23
Consolidated Television Cable Serv., Inc., v. City of Frankfort, 857 F.2d. 354 (6th Cir. 1988), *cert. denied*, 489 U.S. 1082 (1989) 18
Davis v. Mills, 194 U.S. 451 (1904) 29
Day v. Volkswagenwerk Aktiengesellschaft, 464 A.2d 1313 (Pa. Super. 1983) 23
DelCostello v. Teamsters, 462 U.S. 151 (1983) 26
Dual & Assocs., Inc. v. Wells, 403 S.E.2d 354 (Va. 1991) 23
Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1874) ... *passim*
Empire Fire & Marine Ins. Co. v. J. Transport, Inc., 880 F.2d 1291 (11th Cir. 1989) 21
Evans v. Cowan, 468 S.E.2d 575 (N.C. App. 1996), *aff'd*, 477 S.E.2d 926 (N.C. 1996) 23
Federal Insurance Co. v. Gates Learjet Corp., 823 F.2d 383 (10th Cir. 1987) 20
Frandsen v. Westinghouse Corp., 46 F.3d 975 (10th Cir. 1995) . 21
Gasbarra v. Park-Ohio Indus., Inc., 655 F.2d 119 (7th Cir. 1981) 18
Gatzemeyer v. Vogel, 589 F.2d 360 (8th Cir. 1978) 19
Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d. Cir. 1986), *cert. denied*, 480 U.S. 948 (1987) 15
Gibbs v. Air Canada, 810 F.2d 1529 (11th Cir. 1987) 21
Goddard v. Security Title Ins. & Guar. Co., 92 P.2d 804 (Cal. 1939) 5
Gonzales v. Banco Central Corp., 27 F.3d 751 (1st Cir. 1994) . 14
Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 27-28
Hancock National Bank v. Farnum, 176 U.S. 640 (1900) 7, 8
Harborside Refrigerated Servs., Inc. v. Vogel, 959 F.2d 368 (2d Cir. 1992) 15

CASES: **PAGE:**

Harnett v. Billman, 800 F.2d 1308 (4th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) 17
Hart v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468 (11th Cir. 1986) 21
Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294 (1917) ... 28
Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948) 16
Hauser v. Krupp Steel Producers, Inc., 761 F.2d 204 (5th Cir. 1985) 17
Havoco of America, Ltd. v. Freeman, Atkins & Coleman, Ltd., 58 F.3d 303 (7th Cir. 1995) 19
Hayles v. Randall Motor Co., 455 F.2d 169 (10th Cir. 1971) ... 20
Heck v. Humphrey, 512 U.S. 477 (1994) 12
Heiser v. Woodruff, 327 U.S. 726 (1946) 12
Hillary v. Trans World Airlines, Inc., 123 F.3d 1041 (8th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998) 19
Holmberg v. Armbrecht, 327 U.S. 392 (1946) 28
Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (D.C. Cir. 1983) ... 22
Hyatt v. McBurney, 18 S.C. 199 (S.C. 1882) 23
In re Air Crash at Dallas/Ft. Worth Airport, 861 F.2d 814 (5th Cir. 1988) 17
In re Kaplan, 143 F.3d 807 (3d Cir. 1998) 16
Iowa Elec. Light & Power Co. v. Mobile Aerial Towers, Inc., 723 F.2d 50 (8th Cir. 1983) 19
Johnson v. SCA Disposal Services of New England, Inc., 931 F.2d 970 (1st Cir. 1991) 14
Kent County Bd. of Educ. v. Bilbrough, 309 Md. 487, 525 A.2d 232 (1987) 6, 7
Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) 14-15, 28
Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 26
Koch v. Rodlin Enters., Inc., 223 Cal. App. 3d 1591 (1990) 5
Lackner v. LaCroix, 602 P.2d 393 (Cal. 1979) 5
Lane v. Sullivan, 900 F.2d 1247 (8th Cir.), *cert. denied*, 498 U.S. 847 (1990) 19
Lamontagne v. Board of Trustees of the United Wire, Metal & Mach. Pension Fund, 583 N.Y.S.2d 838 (App. 1992) 23
Lubrizol Corp. v. Exxon Corp., 929 F.2d 960 (3d Cir. 1991) ... 16
Manning v. City of Auburn, 953 F.2d 1355 (11th Cir. 1992) ... 21

CASES: **PAGE:**

Makiriw v. Rinard, 336 F.2d 333 (3d Cir. 1964) 16
McCarty v. First of Georgia Ins. Co., 713 F.2d 609 (10th Cir. 1983) 20
McDonald v. Johnson & Johnson, 776 F.2d 767 (8th Cir. 1985) 19
Metcalf v. City of Watertown, 153 U.S. 671 (1894) 11
Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co., 662 A.2d 536 (N.J. 1995) 24
Morgan v. Inter-Continental Trading Corp., 360 F.2d 853 (7th Cir. 1966) 18
Murphy v. Klein Tools, Inc., 935 F.2d 1127 (10th Cir.), *cert. denied*, 502 U.S. 952 (1991) 20
NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) 21
Palmer v. Lanco Constr., Inc., 665 So.2d 1217 (La. App. 1996) 23
Pardo v. Olson & Sons, Inc., 40 F.3d 1063 (9th Cir. 1994) 20
Pennconn Enters., Inc. v. Huntington, 538 A.2d 673 (Vt. 1987) 23
Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329 (10th Cir. 1988) 20
Pierson Sand & Gravel, Inc. v. Keeler Brass Co., 596 N.W.2d 153 (Mich. 1999) 23
Pilie' & Pilie' v. Graham, 547 So.2d 1305 (La. 1989) 23
Pleming v. Universal-Rundle Corp., 142 F.3d 1354 (11th Cir. 1998) 14, 22
PRC Harris, Inc. v. Boeing Co., 700 F.2d 894 (2d Cir.) 15
Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985) 21
Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co., 411 F.2d 88 (3d Cir. 1969) 16
Real Estate Exch. Corp. v. Muskegon County Drain Comm'r, 8 N.W.2d 652 (Mich. 1943) 23
RecoverEdge L.P. v. Pentecost, 44 F.3d 1284 (5th Cir. 1995) .. 18
Reimer v. Smith, 663 F.2d 1316 (5th Cir. 1981) 17
Reinke v. Boden, 45 F.3d 166 (7th Cir.), *cert. denied*, 516 U.S. 817 (1995) 18, 29
Robbins v. HNG Oil Co., 878 S.W.2d 351 (Tex. App. 1994) ... 23
Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 13

CASES: **PAGE:**

Schieffler v. Financial Servs. Ins. Co.,
39 F.3d 181 (8th Cir. 1994) 19
Schneider v. Lockheed Aircraft Corp.,
658 F.2d 835 (D.C. Cir. 1981) 22
Semler v. Psychiatric Inst. of Washington, D.C., Inc.,
575 F.2d 922 (D.C. Cir. 1978) 22, 27
Semtek Int'l Inc. v. Lockheed Martin Corp., 988 F.
Supp. 913, (D. Md. 1997) 6
Shoup v. Bell & Howell Co., 872 F.2d 1178 (4th Cir. 1989) . 17, 30
Silcox v. United Trucking Serv., Inc.,
687 F.2d 848 (6th Cir. 1982) 18
Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.,
870 F.2d 1044 (5th Cir. 1989) 18, 30
Sun Oil v. Wortman, 486 U.S. 717 (1989) 29
Townsend v. Jemison, 50 U.S. (9 Cranch) 407 (1850) 29
Tucker v. Crikelair, 493 A.2d 247 (Conn. App. 1985) 24
Turner v. Yamaha Motor Corp., U.S.A.,
591 A.2d 886 (Md. App. 1991) 4
UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966) 26
United States v. Donnally, 33 U.S. (8 Pet.) 361 (1834) 29
United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) 26
Venuto v. Witco Corp., 117 F.3d 754 (3d Cir. 1997) 16
Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 26
Wedel v. American Elec. Power Serv. Corp.,
681 N.E.2d 1122, (Ind. App. 1997) 24
Wesch v. Folsom, 6 F.3d 1465 (11th Cir. 1993),
cert. denied, 510 U.S. 1046 (1994) 22
Weston Funding Corp. v. Lafayette Towers, Inc.,
550 F.2d 710 (2d Cir. 1977) 15
Williams v. Ocean Transp. Lines, Inc.,
425 F.2d 1183 (3d Cir. 1970) 16
Wilson v. Garcia, 471 U.S. 261 (1985) 26
Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.,
32 Cal. App. 4th 1511 (1995) 23
Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.),
cert. denied, 377 U.S. 934 (1964) 15

CONSTITUTION, STATUTES AND RULES: **PAGE:**

U.S. Const. art. IV, § 1 10
28 U.S.C. § 1257(a) 1
28 U.S.C. § 1738 ..... 1, 27
Fed. R. Civ. P. 41(b) 2, 27-29
Md. Ct. & Jud. Proc. Code Ann. § 5-101 4

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(1971 & Rev. 1989) 4, 29
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18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper,
Federal Practice and Procedure (1981) 9, 25-26, 28-29

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71 Cornell L. Rev. 733 (1986) 9-10, 13, 21-22, 26, 29
Ronan E. Degnan, *Federalized Res Judicata*,
85 Yale L.J. 741 (1976) 9-10, 13
Howard M. Erichson, *Interjurisdictional Preclusion*,
96 Mich. L. Rev. 945 (1998) 10, 24
Hon. Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*,
45 Colum. L. Rev. 1 (1945) 14
Graham C. Lilly, *The Symmetry of Preclusion*,
54 Ohio St. L. J. 289 (1993) 9-10, 24
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PETITION FOR A WRIT OF CERTIORARI

Semtek International Incorporated ("Semtek") respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Special Appeals of Maryland.

OPINIONS BELOW

The decision of the Court of Special Appeals of Maryland is reported at 736 A.2d 1104. *See also* App. 1a-34a. (References to the Appendices to this Petition are styled "App. __a.") The decision of the trial court (App. 36a-47a) is unreported.

JURISDICTION

The Court of Special Appeals of Maryland entered its judgment on September 7, 1999. Semtek filed with the Court of Appeals of Maryland a timely petition for a writ of certiorari, which was denied on December 21, 1999. *See* App. 35a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULE, INVOLVED

The Full Faith and Credit Clause, art. IV, § 1, reads:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Full Faith and Credit Statute, 28 U.S.C. § 1738, reads in relevant part:

> . . . The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State Territory or Possession from which they are taken.

Fed. R. Civ. P. 41(b) reads:

Rule 41. DISMISSAL OF ACTIONS

* * *

(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

STATEMENT OF THE CASE

The underlying litigation involves claims of business torts allegedly inflicted on Semtek by respondent Lockheed Martin Corporation ("Lockheed"), none of which arises under federal law. Semtek's first complaint, filed in a California state court and removed by Lockheed to federal court on the basis of diversity of citizenship, was dismissed as untimely under California's two-year statute of limitations. Semtek then refiled in Maryland, where Lockheed has its corporate headquarters and where the case is concededly timely under Maryland's three-year statute of limitations. The law of both California and Maryland treats the California dismissal as merely barring suit under California's two-year statute of limitations, so as to permit the case to go forward in Maryland. Nevertheless, Lockheed won dismissal of the case on the ground that, because the California dismissal was rendered by a federal court sitting in diversity, a federal rule of res judicata purportedly applied, one that the Maryland courts construed as precluding further suit.[1]

[1] The term "res judicata" is sometimes used to refer to the entire subject of the effect of a prior judgment in a subsequent action, and sometimes to refer only to the doctrine of claim preclusion. *See Baker v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (1998). It is here used in its broader sense, given that the decision below raises the broad question of what law governs the preclusive effect of a federal court diversity judgment. The dismissal of this particular action by the Maryland state courts, however, was based on the doctrine of claim preclusion — specifically, a minority approach to claim preclusion. This approach holds that the dismissal of an action because of the statute of limitations of one jurisdiction bars a subsequent action on the claim, even in a jurisdiction that would allow the action under its own, longer period of limitations. See pp. 29-30 & note 23, *infra*.

Semtek urged the Maryland courts to adhere to this Court's decisions in *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874), and its progeny — decisions that this Court has never overruled or explicitly modified — holding that the res judicata effect of the judgment of a federal court sitting in diversity is defined by the state law of the first forum. The courts below rejected that argument.

Accordingly, this case squarely presents the issue, on which the lower federal and state courts have been in conflict since the 1960s, of whether *Dupasseur* is still good law. If this Court decides to modify or overrule the *Dupasseur* decision, this case presents an excellent vehicle for resolving the uncertainty in the lower courts on a critical question: what is the appropriate federal rule governing the res judicata effect of a statute-of-limitations dismissal issued by a federal court sitting in diversity?

1. Semtek's first lawsuit, filed in California. On February 26, 1997, Semtek filed a business tort suit in California state court against Lockheed and one of its key executives. App. 2a, 60a. Because the executive was a California resident (Complaint ¶ 4), there was no evident basis for removal. However, because defendants' attorneys were provided with a courtesy copy of the complaint prior to service, and because defendants filed removal papers before service on the in-state defendant, Lockheed was able to remove the case to California federal court. App. 61a.

After removal, Lockheed successfully moved for dismissal on the sole basis that Semtek's claims had accrued by August 8,

1994, so that the lawsuit was untimely under California's two-year statute of limitations. App. 49a, 54a-58a, *aff'd*, 1999 U.S. App. LEXIS 3150 (9th Cir. 1999). The California federal court's dismissal was entered on May 8, 1997. App. 59a.[2]

2. Semtek's second lawsuit, filed in Maryland. "During the pendency of the California action, additional investigation by Semtek revealed that much of the alleged tortious conduct occurred in Maryland," App. 37a, where Lockheed is headquartered. App. 4a n.1. On July 2, 1997, Semtek filed suit against Lockheed in Maryland state court. App. 3a, 62a. As Lockheed has not contested, this second lawsuit is timely under Maryland's three-year statute of limitations.[3] Further, California

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[2] The form of judgment prepared by Lockheed and signed by the California federal district court judge recited that the action was "dismissed in its entirety on the merits and with prejudice." App. 59a. In the Maryland courts, Lockheed argued that this language of its own force barred the Maryland action. In addition to rebutting this argument in its Maryland filings, *see, e.g.*, Brief of Appellant, filed Nov. 30, 1998, at 13-14 & n.6 (citing cases demonstrating that such language is conclusive under neither California nor federal law), Semtek made an unsuccessful effort to amend the California federal court judgment to remove this language from the judgment and hence moot Lockheed's argument. *See* App. 11a-12a. Ultimately, the Maryland appellate court ruled that given its holding that federal law controlled, and its interpretation of federal law, the language cited by Lockheed was "redundant" of what the court believed the judgment would automatically be deemed to mean under federal law even absent the language. App. 21a.

[3] *See* App. 37a, 62a & n.2 (quoting Md. Cts. & Jud. Proc. Code Ann. § 5-101). Unlike other states, Maryland has no borrowing statute (*see generally* Restatement (Second) of the Conflict of Laws § 142(1) & cmt. f (1971); *id.* § 142 & cmt. b (Rev. 1989)) relevant to this case that would adopt the shorter statute of limitations of any other state where any of the causes of action may have arisen. *See Turner v. Yamaha Motor Corp., U.S.A.*, 591 A.2d 886 (Md. App. 1991). Given Maryland law, as Lockheed explicitly acknowledged below, "the timeliness of [Semtek's] suit in Maryland under Maryland's statute of limitations" is "not raised in this case. Lockheed Martin has not sought to dismiss Semtek's Maryland suit on the statute of limitations grounds but on grounds of *res judicata*." Lockheed Martin Corporation's Answer to Petition for Writ of Certiorari, filed Nov. 8, 1999, at 8 n.3 (Md. Ct. App.).

law would permit the second lawsuit to proceed, as California res judicata law follows the majority rule, under which a statute-of-limitations dismissal does not foreclose suit in another forum offering a longer statute of limitations. *See* Restatement (Second) of the Conflict of Laws §§ 142, 143 (1971); *id.* § 142 (Rev. 1989); *see, e.g., Koch v. Rodlin Enters., Inc.*, 223 Cal. App. 3d 1591, 1595-96 (1990). *See also Lackner v. LaCroix*, 602 P.2d 393, 395 (Cal. 1979); *Goddard v. Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806 (Cal. 1939).

Relying on federal law, Lockheed sought to end the Maryland state court action in three ways. First, in the California federal court, Lockheed sought to enjoin Semtek from proceeding with the Maryland action. App. 4a-5a, 60a-72a. The federal court denied this motion, in part because it did "not consider [it] to be obvious that *res judicata* would apply to bar Plaintiff's Maryland state court action." App. 65a.[4]

Second, even though it is a citizen of Maryland and Semtek's complaint alleged only state-law claims, Lockheed sought to remove the lawsuit to the U.S. District Court for the District of Maryland. Lockheed did so on the theory that it possessed a res judicata defense based on the California federal court's statute-of-limitations dismissal, so that the case was

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[4] *See also* App. 71a n.17 (reiterating that "it is not obvious to this Court that *res judicata* applies to bar Plaintiff's action in Maryland state court," while cautioning that "any dicta or other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of the issues of removal jurisdiction and *res judicata* preclusion."); App. 71a ("This Court's prior order did not reach the substantive merits of Plaintiff's tort claims. If another proper forum will afford Plaintiff the opportunity to fully litigate the merits of its causes of action, without applying a statutory or *res judicata* bar, the Court does not find it appropriate to bar Plaintiff from proceeding in that forum."). The appellate court below quoted this passage in summarizing the California federal court's holding in denying an injunction. App. 4a-5a. But later, in the section of its decision that rejected the California federal court's analysis of the meaning of its own judgment, the appellate court stated that the passage was "inconsequential[]" dicta whose persuasive weight was no greater than that of "cocktail party conversation." App. 10a-11a.

thereby one "arising under" federal law. The Maryland federal court granted Semtek's motion to remand on the ground that removal cannot be predicated on an alleged federal affirmative defense. *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, 988 F. Supp. 913, 915-16 (D. Md. 1997); *see also* App. 5a.

Third, on remand, as a last resort Lockheed filed a motion in the Maryland state trial court to dismiss the lawsuit as barred by res judicata. It argued that the preclusive effect of the statute-of-limitations dismissal in California is to be measured by *federal* law, as the dismissal was entered by a *federal* court sitting in diversity — and that the applicable federal rule (supposedly mandated by Fed. R. Civ. P. 41(b)) bars suit anywhere else in the country, even in a forum (such as Maryland) offering a longer limitations period. *See* Motion to Dismiss, filed March 3, 1998. The disposition of this motion forms the basis of Semtek's petition for a writ of certiorari.

3. The Rulings Below on Whether a Federal Rule is Controlling, and on the Content of that Federal Rule. Opposing Lockheed's motion to dismiss, Semtek argued that the res judicata effect of the California federal court's statute-of-limitations dismissal must be measured "by reference to California *res judicata* law," which does not bar litigants from filing suit in another forum with a longer limitations period. Opposition filed March 23, 1998, at 2. Semtek relied both on general principles of full-faith-and-credit jurisprudence, *id.* at 4-6, and on the specific doctrine that the res judicata effect of the judgment of a federal court sitting in diversity is governed by the state law of the first forum, *id.* at 16.

The Maryland trial court agreed with Lockheed. App. 36a-47a. It reasoned that prior Maryland precedent required it to apply federal law to determine the res judicata effect of the California statute-of-limitations dismissal. App. 38a-39a (citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 493, 525

A.2d 232, 235 (1987)).[5] Examining what it considered controlling federal law, it held that "[t]he plain language of" Fed. R. Civ. P. 41(b) "requires that the dismissal of the Plaintiff's California action be deemed an adjudication on the merits" that bars a second suit in any other state. App. 39a.

In the intermediate court of appeals, Semtek urged that the trial court had committed a fundamental error in regarding the res judicata effect of the California diversity judgment as governed by federal rules of preclusion. Semtek invoked a line of cases from this Court starting with *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), for the proposition that the res judicata effect of the judgment of a federal court sitting in diversity is the effect that would be given to the judgment by a state court in the first forum. Brief of Appellant, filed Nov. 30, 1998, at 17-18 (citing *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 645 (1900) (in turn citing *Dupasseur*, 88 U.S. at 135)). Semtek noted that "[t]his holding has never been altered by the Supreme Court" despite several opportunities to do so during the past three decades. *Id.* at 18 & n.10.

In the alternative, Semtek argued that even if federal law did somehow control, the trial court had erred in its construction of federal law as requiring that a statute-of-limitations dismissal under California law in federal court bars suit in any other court under any other law. Under such an analysis, the accident of diversity jurisdiction that permitted Lockheed to remove the case to federal court before obtaining a dismissal would lead to an outcome opposite from what would have attached to a statute-of-limitations dismissal in state court. *Id.* at 21-34.

The intermediate court of appeals rejected both arguments. With only minimal reference to the *Dupasseur* line of cases,

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[5] Further, the trial court stated that even if it were not bound by the Maryland Court of Appeals' decision in *Kent County Board of Education*, it would reach that result of its own accord based on the analysis set out in the decisions of several federal circuit courts of appeals, and of a Missouri appellate court. *See* App. 40a-46a.

App. 17a-18a (suggesting that *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1900), dealt only with abstract principles concerning "full faith and credit between the states and the federal courts"), it held that precedent from the highest court of Maryland "unambiguously" required it to treat the res judicata issue as one of federal law. App. 7a. Looking to federal law, the appellate court agreed with the trial court that Fed. R. Civ. P. 41(b) is most properly read as giving sweeping preclusive effect to a statute-of-limitations dismissal in a diversity case, even where no such preclusion would attach to a dismissal if the case were handled in state court. App. 8a, 12a-34a. Indeed, the court went so far as to hold that "California state preclusion law" was "utterly immaterial" to the disposition of this case. App. 32a.

Semtek sought discretionary review in the Court of Appeals of Maryland, citing the "venerable line of cases," starting with *Dupasseur*, in which this Court "has held that in a diversity case, the judgment of a federal court on a question of state law has the same, and no greater, effect than as if it had been rendered by a court of the state in which the federal court sits." Petition for a Writ of Certiorari, filed Oct. 21, 1999, at 16 (citing seven cases). Semtek also argued that the sweeping effect given Rule 41(b) by the lower courts had met with substantial criticism by commentators and was inconsistent with leading appellate decisions. *Id.* at 8-12, 17-21. The Court of Appeals denied review. App. 35a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE LOWER COURTS OVER WHAT LAW GOVERNS THE RES JUDICATA EFFECT OF A FEDERAL DIVERSITY JUDGMENT

As commentators have been noting for nearly a quarter century, there exists among the lower courts a deep disagreement about a fundamental question that warrants this Court's review: whether the res judicata effect of a federal diversity judgment is

governed by state or federal law. *See, e.g.*, Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 750-55 & n.49 (1976); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4468, at 654-56, § 4472, at 725-26, 732-36 (1981) ("Wright & Miller"); Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 Colum. L. Rev. 1505, 1505-07, 1514 (1985); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 778-80 (1986); Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L. J. 289, 316-17 & n.101, 319, 322-23 & n.121 (1993); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 989-90, 998, 1005-13 (1998). *See also* Restatement (Second) of the Law of Judgments, § 87, cmt. a (1982) ("the legal basis for recognition of a federal judgment has been a matter of considerable uncertainty"); *id.* § 87, Reporter's Note, cmt. b (stating that "[m]any cases have said flatly that when the federal court sits in diversity jurisdiction, the law of the state where it sits determines the res judicata effects of the federal judgment," and then critiquing this position).

This basic element of the law of res judicata "has been a source of confusion" at least since the 1960s. Degnan, *supra*, 85 Yale L.J. at 764 (citing cases). The confusion should finally be put to rest by a grant of certiorari in this case. As Professor Erichson has recently noted:

> The need for a clear, reliable rule of interjurisdictional preclusion has grown with the phenomenal growth of multiparty, multiforum litigation. The unpredictability of choice of preclusion law and the tendency of many courts unthinkingly to apply their own preclusion law to other courts' judgments highlight the need for a clear rule. At this point, the question should not be whether to have a clear rule, but rather what that rule should be.

96 Mich. L. Rev. at 1015. *See also* Lilly, *supra*, 54 Ohio St. L.J. at 322-23 ("Of course, the need for certainty does not tell us which solution, state or federal, is preferable. What it does suggest is that an authoritative uniform approach should be forged — if not by Congress then by the Supreme Court. Whatever the ultimate solution with respect to the choice-of-law problem, the present uncertainties should not be allowed to linger.").

We briefly sketch this Court's decisions to date on this issue, and then summarize the differing approaches that have been taken by the federal courts of appeals and the state courts.

A. The *Dupasseur* Line of Cases in This Court

With regard to the res judicata effect that must be given the judgments of *state* courts, under the Full Faith and Credit Clause and the statute implementing and extending it, the law has long been clear: the second forum must give the same res judicata effect as would the rendering state court.[6] No similar constitutional or statutory provision addresses the res judicata effect owed the judgments of *federal* courts, so that the rules in this area are ultimately set by this Court.[7]

More than a century ago, this Court articulated a simple rule to be followed with respect to the res judicata effect of the judgment of a federal court sitting in diversity: the judgment has the same effect as if it had been rendered by a state court in the first forum. This rule has never been overruled or explicitly

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[6] *See* U.S. Const. art. IV, § 1; 28 U.S.C. § 1738; Burbank, *supra*, 71 Cornell L. Rev. at 797-805; Degnan, *supra*, 85 Yale L.J. at 742-44; Erichson, *supra*, 96 Mich. L. Rev. at 983-84, 991-94; Lilly, *supra*, 54 Ohio St. L.J. at 291-93, 301-15.

[7] *See* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1469, 1473-74 (4th ed. 1996); Burbank, *supra*, 71 Cornell L. Rev. 739-47, 753-55, 772-73, 781-83; Degnan, *supra*, 85 Yale L.J. at 744-45; Erichson, *supra*, 96 Mich. L. Rev. 984-89, 1005-08; Lilly, *supra*, 54 Ohio St. L.J. at 315-27.

modified; indeed, in recent decades this Court's res judicata decisions have been crafted so as to avoid altering this basic rule.

In *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), this Court held that the res judicata effect of a federal diversity judgment "is such as would belong to judgments of the State courts rendered under similar circumstances," and that "no higher sanctity or effect can be claimed." *Id.* at 135. Applying this principle, this Court stated that it was not enough that under general common law principles the defendant in the Louisiana state-court litigation under review would not be considered in privity with the defendant who had lost the earlier Louisiana federal court diversity case. Rather, the Court examined "with some care" the nature of Louisiana law concerning privity, *id.* at 135, and only after determining that there was nothing "peculiar in the Louisiana laws" which would support a finding of privity did the Court affirm the finding of the Louisiana courts below that the earlier federal diversity judgment did not bind the defendant in the Louisiana state court suit. *Id.* at 137.

In *Metcalf v. City of Watertown*, 153 U.S. 671, 676 (1894), this Court, in reaffirming *Dupasseur*, stated: "It cannot be doubted that . . . the judgment and decrees of" federal courts sitting in diversity "are entitled to the same sanctity and effect in the courts of each State, when those courts are held within the State, as their own judgments, nothing more, but nothing less."

In *Hancock National Bank v. Farnum*, 176 U.S. 640 (1900), this Court overturned the Rhode Island Supreme Court's attempt to apply its own res judicata law to shield one of its citizens from liability pursuant to a Kansas federal court judgment in a diversity case. In so doing, this Court reiterated again that the effect of the judgment is "not answered by referring to general principles of law . . ., but can be answered only by an examination of the decisions of the courts of Kansas." *Id.* at 643; *see also id.* at 644-45 (noting that "what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered" is the key question to be determined, and "[t]he fact that this judgment was rendered in a court of the

United States, sitting within the State of Kansas, instead of one of the state courts, is immaterial").

By contrast, the Maryland courts below took a quite different view, holding that "California state preclusion law" was "utterly immaterial." App. 32a.

The *Dupasseur* line of cases has been left undisturbed, despite this Court's decisions in several cases in which it might easily have articulated a rule for the res judicata effect of federal court judgments that would have displaced *Dupasseur*. For example, in *Heiser v. Woodruff*, 327 U.S. 726 (1946), involving the res judicata effect of a judgment in a federal question case, the Court carefully stated that it "need not consider whether . . . the rule of *res judicata* applied" in diversity cases "can be other than that of the state in which the federal court sits," *id.* at 731-32, and limited its analysis to reaffirming that "in non-diversity cases . . . the federal courts will apply their own rule of *res judicata*." *Id.* at 733 (citations omitted). In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), the Court reaffirmed its holding in *Heiser*, again making a narrow statement that as to res judicata, "[i]n federal-question cases, the law applied is federal law." *Id.* at 324 n.12. Lending support to the continued vitality of the *Dupasseur* line of cases, this Court noted that "[m]any federal courts, exercising both federal question and diversity jurisdiction, are in accord" in recognizing non-mutual collateral estoppel, "unless in a diversity case *bound to apply a conflicting state rule* requiring mutuality." *Id.* at 325 (emphasis added). *See also Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994) (narrow statement that "[s]tate courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of *federal* law.") (emphasis added).

Even the leading proponent of the view that the res judicata effect of federal court judgments should always be determined by federal law recognizes that this Court has never abandoned the rule set out in the *Dupasseur* line of cases. *See* Degnan, *supra*, 85 Yale L.J. at 770 ("[S]ince *Dupasseur* . . . the Supreme

Court has held that the scope of a federal judgment is determined by the law of the state in which it was rendered, and it has yet to declare that this is no longer the law.").

B. The Conflict and Confusion Among the Federal Circuit Courts of Appeals on This Issue

The lower courts, federal and state alike, operate under an elementary obligation to comply with this Court's past holdings unless and until overruled, even where the foundation of a holding may appear shaky to a lower court. *See, e.g., Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Nevertheless, the status of the *Dupasseur* line of cases in the federal circuit courts is in flux. As of 1976, the beginnings of a departure from *Dupasseur* existed. *See* Degnan, *supra*, 85 Yale L.J. at 756-60, 764-71. Ten years later, several circuits had at least tentatively adopted a view contrary to the rule set out in *Dupasseur*. These courts held that a uniform federal res judicata rule is to be used to measure the res judicata effect of a diversity judgment. *See* Burbank, *supra*, 71 Cornell L. Rev. at 778-80.

Currently, it appears that only three circuits firmly adhere to the *Dupasseur* rule (the Eighth, Ninth, and D.C. Circuits). Four circuits unambiguously treat the res judicata effect of a diversity judgment as a federal issue (the First, Fourth, Fifth, and Sixth Circuits). The law in the other circuits on this issue is undecided and/or the subject of intracircuit conflicts. (See generally sources cited on p. 9, *supra*.). Even in an ordinary case, such broad and persistent disagreement on an important question of law would warrant this Court's review. When the issue involves the preclusive effect of prior judgments, which necessarily entails relationships among different jurisdictions, such disagreement is intolerable. As matters stand, the same federal court diversity judgment will be given different preclusive effect depending upon the particular jurisdiction in which that judgment becomes a matter of dispute. Certiorari is urgently needed.

We briefly summarize the relevant cases, in chronological order, on a circuit-by-circuit basis.[8]

***First Circuit*: Federal Law Applies.** Although earlier decisions are mixed, in *Johnson v. SCA Disposal Services of New England, Inc.*, 931 F.2d 970, 974 (1st Cir. 1991), the First Circuit adopted "the rule that, in diversity cases, federal law governs the preclusive effect of prior federal judgments." *Gonzales v. Banco Central Corp.*, 27 F.3d 751, 755 (1st Cir. 1994), appeared to suggest that the use of federal res judicata law might be limited to federal question cases. But *Apparel Art International, Inc. v. Amertex Enterprises Ltd.*, 48 F.3d 576, 582 & n.7 (1st Cir. 1995), again articulated a flat rule under which federal res judicata law is applied to all federal court judgments.

***Second Circuit*: No Definitive Ruling.** In *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962), a decision that has been widely cited by other circuits that have adopted a federal rule, the Second Circuit expansively stated that "the effect of a judgment of a federal court" should not be "governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity." *Kern* accorded outcome-determinative preclusive effect to a California federal court's

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[8] Given this Court's flat holding in *Dupasseur* that state law governs the res judicata effect of a federal judgment in a diversity case, and given the obligation of the lower courts to comply with this Court's holdings until changed, accounting for the current confusion in the lower courts on this issue is difficult. One explanation for the disarray may lie with the context in which full-faith-and-credit issues are typically litigated. As Justice Jackson once noted, the law in this area "depends generally on private advocacy, not always supported by the best research and understanding." Hon. Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 33-34 (1945); *see also id.* at 3 & n.6. For example, the Eleventh Circuit, which suffers from a sharp intracircuit split over the res judicata effect of a diversity judgment, see pp. 21-22, *infra*, set out the issue in a recent decision "in the hope that future litigants will consider and brief the issue." *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356 n.1 (11th Cir. 1998).

dismissal for failure to prosecute, reasoning that "[o]ne of the strongest policies a court can have is that of determining the scope of its own judgments." *Id.* (citing *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958)). Subsequent decisions read *Kern* narrowly, then broadly, then narrowly again.[9] Decisions during the past decade make clear that the Second Circuit is officially undecided on the source of law governing the preclusive effect of a federal diversity judgment.[10]

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[9] In *Zdanok v. Glidden Co.*, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964) (Friendly, J.), the Second Circuit signaled that *Kern* had not definitively resolved this area of the law, observing that because *Zdanok* was a federal question case involving the res judicata effect of judgment in an earlier federal question case, "we are free to follow our own conceptions" concerning res judicata, "and need not decide whether" the same result would be appropriate "if federal jurisdiction in either or both actions rested on diversity alone." *Id.* at 956 (citing *Kern*, 303 F.2d at 340). Similarly, in *Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710, 713 & n.3 (2d Cir. 1977), the court noted that it "need not decide whether state or federal law . . . would control the *res judicata* effect of a dismissal by a federal court in a diversity action when the dismissal is based not on a federal rule as it was in *Kern*, but on a state door-closing statute," as there was "no reason to believe" that federal and state law differed on the particular issue in the case at hand.

By contrast, in *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896-97 & n.1 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983), a Second Circuit panel broadly read the *Kern* decision as holding that "the *res judicata* effect that will be given the judgment of a federal court is distinctively a matter of federal law," and relied on this view to hold that a prior statute-of-limitations dismissal barred further suit. More recently, in *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 42 n.3 (2d. Cir. 1986) (Newman, J.), *cert. denied*, 480 U.S. 948 (1987), another panel narrowly read the *Kern* decision, noted that "[f]ederal courts routinely apply state law to determine the preclusive effect of a federal diversity judgment in a subsequent diversity action," and concluded that given the nature of the case, "we need not decide the choice of law issue relative to a federal diversity judgment."

[10] *See Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 373 (2d Cir. 1992) (noting that whether state or federal law "governs the preclusive effect of the judgment of a federal court sitting in diversity on another federal diversity action" is "a legitimate concern," and stating that "we have not definitely decided the issue," but concluding on the facts that "its

***Third Circuit*: No Definitive Ruling.** In early decisions, the Third Circuit adhered, without discussion, to the rule that state law controls the preclusive effect of a federal diversity judgment. *See, e.g.*, *Hartmann v. Time, Inc.*, 166 F.2d 127, 137-38 (3d Cir. 1947), *cert. denied*, 334 U.S. 838 (1948); *Makiriw v. Rinard*, 336 F.2d 333, 334 (3d Cir. 1964); *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.*, 411 F.2d 88, 94 (3d Cir. 1969). Then, in a puzzling decision, the court applied federal law to decide the res judicata effect of an earlier diversity court judgment, on the basis that the second lawsuit was a federal question lawsuit. *Williams v. Ocean Transp. Lines, Inc.*, 425 F.2d 1183, 1187-90 (3d Cir. 1970) (criticized in Degnan, *supra*, 85 Yale L.J. at 765-66). During the past decade, however, the Third Circuit has indicated that it has not yet authoritatively decided this issue.[11]

***Fourth Circuit*: Federal Law Applies.** Although earlier decisions are mixed, since 1986 the Fourth Circuit has held that

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decision must await another day"); *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 n.1 (2d Cir. 1995) (reiterating that "a genuine legal issue exists as to whether federal law or . . . state law governs the *res judicata* effect of a judgment of a federal court sitting in diversity upon a subsequent federal diversity action," and stating that "we have not definitively ruled on this question and decline to do so here because federal law and New York state law both require the same result").

[11] *See Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 962-63 (3d Cir. 1991) (noting "disagreement in the courts of appeal over whether federal or state law of claim preclusion governs in successive diversity actions," but holding that "[w]e need not resolve this issue here, however, because our holding would be the same under both federal and state law"); *Venuto v. Witco Corp.*, 117 F.3d 754, 758 & n.7 (3d Cir. 1997) (declining to decide "whether federal or state res judicata law governs successive diversity actions," as "the same result would be arrived at" under either law, so that question is "still an open one"); *In re Kaplan*, 143 F.3d 807, 814-15 & n.15 (3d Cir. 1998) (stating that "this circuit has not yet decided which preclusion law will apply in the successive-diversity context"). *But see Collins v. E.I. Dupont de Nemours & Co.*, 34 F.3d 172, 176 (3d Cir. 1994) (applying state law of claim and issue preclusion, without discussion of the issue).

federal law generally governs the res judicata effect of a federal diversity judgment. *See Harnett v. Billman*, 800 F.2d 1308, 1312-13 (4th Cir. 1986) (holding that "where the application of *res judicata* rules does not touch upon an important question of state law such as privity, we will apply federal rules of decision to measure the preclusive effect" of an earlier diversity judgment), *cert. denied*, 480 U.S. 932 (1987); *Brooks v. Arlington Hosp. Ass'n*, 850 F.2d 191, 195 (4th Cir. 1988) (reaffirming *Harnett*); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179-80 (4th Cir. 1989) (reaffirming *Harnett* in a case involving the preclusive effect of a statute-of-limitations dismissal, stating that "federal, not state law determines the preclusive effect of a prior federal judgment").

***Fifth Circuit*: Federal Law Applies.** Although earlier decisions are mixed, the Fifth Circuit, in a 1975 decision relied upon by other circuits that have adopted a federal rule, held that in successive diversity cases, "the federal law of res judicata should be applied." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716 (5th Cir.) (critiqued in Degnan, *supra*, 85 Yale L.J. at 766-68), *cert. denied and appeal dismissed*, 423 U.S. 908 (1975). The court reasoned that this Court's *Dupasseur* decision requires only that state law "govern whether a federal court diversity judgment is res judicata in a subsequent state court action." *Id.* at 717-18 & n.9. The Fifth Circuit has consistently applied this principle since *Aerojet-General*.[12]

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[12] *See, e.g.*, *Reimer v. Smith*, 663 F.2d 1316, 1325 n.9 (5th Cir. 1981) ("When a federal court sitting in diversity is considering the collateral estoppel effect of a prior federal judgment, this circuit applies federal common law.") (citing cases); *Hauser v. Krupp Steel Producers, Inc.*, 761 F.2d 204, 207 (5th Cir. 1985) ("[F]ederal law governs the collateral estoppel effect of an earlier federal judgment, even in diversity cases."); *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269 n.4 (5th Cir. 1986) ("[W]e apply federal law to the question of the *res judicata* or collateral estoppel effect of prior federal court proceedings, regardless of the basis of federal jurisdiction in either the prior or the present action."); *In re Air Crash at Dallas/Ft. Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988) ("Where one federal court is considering the

***Sixth Circuit*: Federal Law Applies**. Although earlier decisions are mixed, in *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 831 (6th Cir. 1978), the Sixth Circuit held that in successive diversity cases, federal law "governs the splitting of a cause of action." Since *Cemer*, the court has applied that approach to the res judicata effect of federal diversity judgments generally. *See Silcox v. United Trucking Serv., Inc.*, 687 F.2d 848, 852 (6th Cir. 1982) (broadly holding that "the scope and effect of a district court judgment in a diversity action is to be determined by federal, not state, law, 'notwithstanding a contrary state rule of *res judicata*'") (quoting *Cemer*, 583 F.2d at 832); *Consolidated Television Cable Serv., Inc., v. City of Frankfort*, 857 F.2d. 354, 357 (6th Cir. 1988) (noting that "the scope of a prior federal court judgment is governed by federal law") (citing *Cemer*), *cert. denied*, 489 U.S. 1082 (1989).

***Seventh Circuit*: No Definitive Ruling**. In two early decisions, the Seventh Circuit applied state law to determine the res judicata effect of an earlier diversity judgment, without discussion of the issue. *See Morgan v. Inter-Continental Trading Corp.*, 360 F.2d 853, 855 (7th Cir. 1966); *Gasbarra v. Park-Ohio Indus., Inc.*, 655 F.2d 119, 121-22 (7th Cir. 1981). In *Reinke v. Boden*, 45 F.3d 166, 170-72 & n.13 (7th Cir.), *cert. denied*, 516 U.S. 817 (1995), the court criticized cases from other circuits that had relied on Fed. R. Civ. P. 41(b) to bar a second suit in successive-diversity situations where the diversity judgment in the first case relied on a statute-of-limitations

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res judicata [e]ffect of another federal court's judgment in a diversity action, the federal common law of res judicata should be applied"); *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045-46 (5th Cir. 1989) (reiterating that "the effect of a prior federal diversity judgment is controlled by federal rather than state res judicata rules," and applying this principle to bar further litigation of a claim after a statute-of-limitations dismissal in another state); *RecoverEdge L.P. v. Pentecost*, 44 F.3d 1284, 1290 & n.11 (5th Cir. 1995) (reaffirming that federal law always determines the preclusive effect of a prior federal judgment).

dismissal. However, in *Havoco of America, Ltd. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303, 307 & n. 7, 308 n.9 (7th Cir. 1995), the court broadly stated, in dicta, that "federal principles of issue preclusion apply when the first judgment is that of a federal court sitting in diversity."

***Eighth Circuit*: State Law Applies**. In early decisions, the Eighth Circuit applied the state law of the rendering forum in deciding the res judicata effect of a federal diversity judgment, with little or no discussion of the issue.[13] During the past decade, the Eighth Circuit has been urged by litigants to adopt the view of other circuits that federal law controls this aspect of res judicata, a request that it has rejected on at least four occasions.[14]

***Ninth Circuit*: State Law Applies**. Although earlier precedent is not entirely clear, at present it appears that the Ninth Circuit follows the traditional rule that "[i]n a subsequent diversity action, . . . the forum state's law applies to determine

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[13] *See, e.g., Gatzemeyer v. Vogel*, 589 F.2d 360, 362 (8th Cir. 1978) (upholding trial court's use of state law to determine res judicata effect in successive-diversity case); *Iowa Elec. Light & Power Co. v. Mobile Aerial Towers, Inc.*, 723 F.2d 50, 52 (8th Cir. 1983) (holding that the state law of collateral estoppel is to be applied in successive-diversity cases); *McDonald v. Johnson & Johnson*, 776 F.2d 767, 769-70 (8th Cir. 1985) (noting that "res judicata is an issue of substantive law requiring the application of state law in diversity actions").

[14] *See Lane v. Sullivan*, 900 F.2d 1247, 1249-50 (8th Cir.) (noting that "cases from our court have consistently concluded that collateral estoppel in a diversity action is a question of substantive law controlled by state common law), *cert. denied*, 498 U.S. 847 (1990); *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 617-18 (8th Cir. 1994) (reaffirming that "we apply state not federal, law" in determining the "preclusive effect [to be given] to the judgment of another federal court" sitting in diversity); *Schieffler v. Financial Servs. Ins. Co.*, 39 F.3d 181, 186 (8th Cir. 1994) (reiterating that "[r]es judicata is an issue of substantive law requiring the application of state law in diversity actions"); *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043 (8th Cir. 1997) (reaffirming that the res judicata effect of a prior diversity judgment is a matter of state law), *cert. denied*, 522 U.S. 1090 (1998).

the preclusive effect of a previous judgment." *Bates v. Union Oil Co.*, 944 F.2d 647, 649 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992). *See also Pardo v. Olson & Sons, Inc.*, 40 F.3d 1063, 1066 (9th Cir. 1994) ("Because this is a diversity case, we apply the collateral estoppel rules of the forum state.").

***Tenth Circuit*: No Definitive Ruling**. In early decisions, the Tenth Circuit held without discussion of the issue that, in successive-diversity actions, the res judicata effect of the earlier judgment is to be determined by state law. *See Hayles v. Randall Motor Co.*, 455 F.2d 169, 173 (10th Cir. 1971); *McCarty v. First of Georgia Ins. Co.*, 713 F.2d 609, 612-13 (10th Cir. 1983). In *Federal Insurance Co. v. Gates Learjet Corp.*, 823 F.2d 383, 386 & n.1 (10th Cir. 1987), the court adhered to the indication in *Hayles* that "a federal court sitting in diversity applies state law in determining the collateral estoppel effect of a prior federal court diversity judgment," while noting the existence of a circuit split over "whether state law or federal law determines the preclusive effect of a federal court diversity judgment."

A year later, in *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988), the court stated that it had not yet "resolved the question of whether state or federal claim preclusion law governs in successive diversity actions in federal court," and elected to apply federal law "at least insofar as the res judicata issue is not clearly substantive," which the court found was not the case with respect to rules concerning claim-splitting. *Id.* at 1332-33. In *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir.), *cert. denied*, 502 U.S. 952 (1991), the court applied federal law to determine the preclusive effect of a statute-of-limitations dismissal in an earlier diversity action. Based on its most recent decisions, however, it appears that the Tenth Circuit is officially undecided on this issue.[15]

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[15] *See American Motorists Ins. Co. v. General Host Corp.*, 946 F.2d 1482, 1485-86 (10th Cir.), *vacated in part*, 946 F.2d 1489 (10th Cir. 1991) (noting that "there appears to be some doubt within the Tenth Circuit as to whether federal or state rules of collateral estoppel, i.e., issue preclusion, apply in successive diversity actions," but concluding that the point need not be decided in the appeal); *Frandsen v. Westinghouse Corp.*, 46 F.3d 975, 977-78 (10th Cir. 1995) (noting that "[t]here is some confusion in this circuit as to whether federal or state rules should apply," but ruling that resolution of the issue was not necessary to the decision of the appeal).

***Eleventh Circuit*: No Definitive Ruling**. Shortly after its creation, the Eleventh Circuit relied on the Fifth Circuit's sweeping *Aerojet-General* decision to hold that "[w]hen a federal court sitting in diversity examines the collateral estoppel or res judicata effect of a prior federal judgment, based either on diversity or a federal question, it must apply federal common law." *Precision Air Parts, Inc. v. Avco Corp.*, 736 F.2d 1499, 1503 (11th Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985) (criticized in Burbank, *supra*, 71 Cornell L. Rev. at 779 & n.218). During the next six years, the court followed this broad holding on at least four occasions.[16]

The court abruptly shifted course in *NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990), where it held that "[f]ederal courts apply the law of the state in which they sit with respect to the doctrine of res judicata." *Id.* at 1560. *See also Manning v. City*

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[16] *See Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986) ("Although both actions were based on state law and originally brought in state court, we apply federal common law because we are determining the preclusive effect of a federal judgment."); *Gibbs v. Air Canada*, 810 F.2d 1529, 1535 (11th Cir. 1987) ("Federal law governs the res judicata effect of a prior judgment in a diversity action in a subsequent diversity case."); *Empire Fire & Marine Ins. Co. v. J. Transport, Inc.*, 880 F.2d 1291, 1293 n.2 (11th Cir. 1989) ("Although there are still some cases that say that when the federal court is exercising its diversity jurisdiction, the law of the state where it sits determines the preclusive effect of its judgment, this view is erroneous.") (citation omitted); *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 & n.4 (11th Cir. 1990) (stating that "even in a case which rests its subject matter jurisdiction solely upon diversity of citizenship, a federal court must apply federal law to determine the preclusive effect of a prior federal court decision," while noting "that questions have been raised as to the wisdom of an absolute rule" under which federal law always applies).

of Auburn, 953 F.2d 1355, 1358 (11th Cir. 1992) (holding that "[f]ederal courts apply state law to questions of res judicata," relying on *NAACP v. Hunt*); *Wesch v. Folsom*, 6 F.3d 1465, 1471 (11th Cir. 1993), *cert. denied*, 510 U.S. 1046 (1994) (same). The Eleventh Circuit recently noted that on the issue of "whether state or federal principles of res judicata apply," its decisions "appear to lead in two different directions," but declined to resolve the issue and called on litigants to "consider and brief the issue" in future cases. *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1356 n.1 (11th Cir. 1998).

***D.C. Circuit*: State Law Applies**. In its first substantial discussion of the issue, the D.C. Circuit, in a case involving the rule governing claim-splitting in successive diversity cases, held that *Erie* and Full Faith and Credit principles "require a federal court exercising diversity jurisdiction in forum II to give the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, *at least* in the absence of an overriding federal interest." *Semler v. Psychiatric Inst. of Washington, D.C., Inc.*, 575 F.2d 922, 927-28 (D.C. Cir. 1978). *Semler* was reaffirmed in *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981), in which the court agreed with Lockheed (respondent here) that "a federal court sitting in diversity must look to local law to determine whether collateral estoppel may be employed." *Id.* at 851 & n.17.

The court appeared to depart from *Semler* in *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1496 (D.C. Cir. 1983), a case giving res judicata effect to a federal diversity judgment pending appeal, in which the court suggested that it was "join[ing] the burgeoning majority of federal courts" applying a federal law of res judicata. But in *Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1505-06 (D.C. Cir. 1984), it reaffirmed the *Semler* rule "that, in diversity actions, state res judicata rules govern absent some overriding federal interest," and harmonized the result in

Hunt as consistent with an *Erie* rule requiring the use of all state res judicata law "that can be characterized as substantive."

***Federal Circuit*: No Rulings**. Petitioner has located no pertinent cases from the Federal Circuit. *See also* Burbank, *supra*, 71 Cornell L. Rev. at 780 n.223.

C. The Conflict and Confusion Among the State Courts on This Issue

Serious conflict and confusion over the res judicata effect of federal diversity judgments is also apparent in the state courts. Although a handful of states appear to be in accord with Maryland in applying federal law,[17] the majority rule among the states is that state law applies.[18] Further adding to the conflict and confusion is that some state courts, and even some federal district courts, have held that the res judicata effect of a federal

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[17] *See, e.g., Pilie' & Pilie' v. Graham*, 547 So.2d 1305, 1306, 1308-09 (La. 1989); *Palmer v. Lanco Constr., Inc.*, 665 So.2d 1217, 1220 (La. App. 1996); *Pierson Sand & Gravel, Inc. v. Keeler Brass Co.*, 596 N.W.2d 153, 156 n.8 (Mich. 1999) (dictum); *Andes v. Paden, Welch, Martin & Albano, P.C.*, 897 S.W.2d 19, 21 (Mo. App. 1995); *Robbins v. HNG Oil Co.*, 878 S.W.2d 351, 357, 361-62 (Tex. App. 1994); *Alcantara v. Boeing Co.*, 705 P.2d 1222, 1225 (Wash. App. 1985).

[18] *See, e.g., Benetton S.p.A v. Benedot, Inc.*, 642 So.2d 394, 399 (Ala. 1994); *Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.*, 32 Cal. App. 4th 1511, 1516-17 (1995); *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1217-19 (Del. 1991) (analyzed in Erichson, *supra*, 96 Mich. L. Rev. at 968-69); *City of Rolling Meadows v. National Adv. Co.*, 593 N.E.2d 551, 556 (Ill. App. 1991), *cert. denied*, 507 U.S. 960 (1993); *Real Estate Exch. Corp. v. Harte*, 8 N.W.2d 652, 657 (Mich. 1943) (citing *Dupasseur*); *Lamontagne v. Board of Trustees of the United Wire, Metal & Mach. Pension Fund*, 583 N.Y.S.2d 838, 840 (App. 1992); *American Home Assurance Co. v. International Ins. Co.*, 641 N.Y.S.2d 241, 243 (App. 1996); *Evans v. Cowan*, 468 S.E.2d 575, 577 (N.C. App. 1996), *aff'd*, 477 S.E.2d 926 (N.C. 1996); *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313, 1316-17 (Pa. Super. 1983); *Hyatt v. McBurney*, 18 S.C. 199, 208 (S.C. 1882) (citing *Dupasseur*); *Pennconn Enters., Inc. v. Huntington*, 538 A.2d 675, 678 (Vt. 1987); *Dual & Assocs., Inc. v. Wells*, 403 S.E.2d 354, 356 (Va. 1991).

diversity judgment is not determined by the state law of the *first* forum, but rather by the state law of the *second* forum.[19]

A grant of certiorari is urgently needed to end the enormous conflict and confusion among the federal and state courts over the fundamental issue of what source of law controls the res judicata effect of a federal diversity judgment. The meaning of a federal judgment should not vary depending upon the particular jurisdiction in which that judgment becomes a matter of dispute.

II. IF *DUPASSEUR* IS MODIFIED OR OVERRULED, THIS CASE PRESENTS THE FURTHER QUESTION OF THE APPROPRIATE RULE GOVERNING THE RES JUDICATA EFFECT OF A STATUTE-OF-LIMITATIONS DISMISSAL OF A FEDERAL COURT DIVERSITY CASE

If on plenary review the Court were to answer the first question by reaffirming in full *Dupasseur* and its progeny — so that the res judicata effect attached to a federal diversity judgment is precisely the effect that would attach to a judgment of the forum state, no more and no less — then this Court's work would be at an end. If Semtek's California suit had remained in state court instead of being removed to federal court, the *sole* res judicata effect that would have attached to a statute-of-limitations dismissal would have been that it was too late to sue under

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[19] *See* Erichson, *supra*, 96 Mich. L. Rev. at 998 (citing cases); Lilly, *supra*, 54 Ohio St. L.J. at 321-22 & n.117 (citing cases). *See also Tucker v. Crikelair*, 493 A.2d 247, 247-48 (Conn. App. 1985) (applying Connecticut law to determine the res judicata effect of a California federal court's statute-of-limitations dismissal); *Wedel v. American Elec. Power Serv. Corp.*, 681 N.E.2d 1122, 1131 (Ind. App. 1997) (applying Indiana law to determine the res judicata effect of the judgment of a Kentucky federal court sitting in diversity); *Mortgageling Corp. v. Commonwealth Land Title Ins. Co.*, 662 A.2d 536, 539-42 (N.J. 1995) (applying New Jersey law to determine the res judicata effect of the judgment of a Pennsylvania federal court sitting in diversity); *Coker v. Basic Media, Ltd.*, 303 S.E.2d 620, 621-22 (N.C. App. 1983) (applying North Carolina law to determine the res judicata effect of a D.C. federal district court's statute-of-limitations dismissal).

California's two-year statute, as Lockheed did not dispute below. In other words, the ruling would have had only an *issue* preclusive effect concerning California's limitations period; it would not have had any *claim* preclusive effect that could bar the Maryland action, which would be subject to Maryland's longer limitations period. California follows the traditional rule "that dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations." 18 Wright & Miller, *supra*, § 4441, at 369. See pp. 4-5, *supra* (citing cases). Thus, if *Dupasseur* is still good law, so that the res judicata effect of a limitations dismissal in federal court is exactly the same as in state court, then it is clear that the California dismissal does not preclude Semtek's Maryland lawsuit.

If this Court were instead to modify or even overrule the *Dupasseur* line of cases, this case would then provide a vehicle for resolving what rule of federal law should govern the res judicata effect of a statute-of-limitations dismissal issued by a federal court sitting in diversity — allowing this Court to set forth by example, in concrete terms, the manner in which post-*Dupasseur* analysis of res judicata questions is to be carried out.

At least three options would then appear to be open to the Court in articulating the content of the federal rule governing statute-of-limitations dismissals in diversity cases.

First, this Court might rule that, although the res judicata effect of a diversity judgment is governed by federal law, there is no important federal interest in dictating the use of a nationally uniform rule governing the effect of a statute-of-limitations dismissal. Instead, as the Court has done on other issues involving federal litigation of state-law claims where no statute or rule is explicitly controlling, the Court could hold that the federal common law rule here is one that *borrows* the pertinent state-law res judicata rule that would have applied if the case had

been brought in, or had remained in, state court.[20] Such an approach would reflect the philosophy that "although federal law must ultimately control the choice, federal law should at times apply state preclusion rules to federal judgments on state questions. This is the position adopted by the Restatement Second of Judgments." 18 Wright & Miller, *supra*, § 4472, at 734 (citing 1 Restatement (Second) of Judgments § 87 (1982)).

Such an approach would retain much of the practical value of the *Dupasseur* rule in preventing the accident of a federal forum from leading to a markedly different result than would have obtained in state court. In so doing, this approach would help promote the principles underlying this Court's *Erie* jurisprudence, carrying out the strong federal interest in preventing the inequitable administration of the laws and in minimizing opportunities for outcome-determinative forum-shopping.[21] As Judge Wilkey put this point, in a decision that

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[20] *See generally* Fallon, Meltzer & Shapiro, *supra* note 7, at 820-29; *see also* Burbank, *supra*, 71 Cornell L. Rev. 796 & n.314 (citing as examples *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941)). Of particular relevance here, in defining the applicable statute of limitations on federal-law claims where Congress has not addressed the matter, this Court has generally directed the use of the statute-of-limitations law of the forum state where compatible with federal interests, despite the substantial variations between fora that are the consequence of such borrowing. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146-48 (1987); *id.* at 157-65 (Scalia, J., concurring in the judgment); *Wilson v. Garcia*, 471 U.S. 261, 266-71 (1985); *DelCostello v. Teamsters*, 462 U.S. 151, 158-62 (1983); *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966); *Campbell v. Haverhill*, 155 U.S. 610, 614-15 (1895); *Bauserman v. Blunt*, 147 U.S. 647, 652-53 (1893); *see also* Burbank, *supra*, 71 Cornell L. Rev. at 768-69 & n.164. The borrowing of state law as federal common law is, of course, hardly confined to the context of federal diversity litigation. *See, e.g., United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-29 (1979).

[21] That concern is well illustrated by the facts of this case. The holding below that Semtek's second lawsuit is barred under a federal rule of res judicata is the product of two forum choices, neither of which, we submit, should have any bearing on the result in this case. First, because Semtek

remains the leading D.C. Circuit case on the res judicata effect of a diversity judgment:

> [T]he principles of *Erie* . . . and the mandate of the Full Faith and Credit Clause as supplemented by 28 U.S.C. § 1738 require a federal court exercising diversity jurisdiction in forum II to give to the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, *at least* in the absence of an overriding federal interest.

Semler v. Psychiatric Inst. of Washington, D.C., Inc., 575 F.2d 922, 927-98 & n.33 (D.C. Cir, 1978) (citation omitted).

There would appear to be no basis for applying a uniform federal rule to determine the res judicata effect of a statute-of-limitations dismissal in a diversity case. The jurisdictional statutes that enabled Lockheed to obtain access to California federal court were designed to afford "out-of-State litigants another tribunal, not another body of law," and "[t]he source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the States." *Guaranty Trust Co. v. York*, 326 U.S. 99, 112 (1945). Thus, in the specific context of

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provided defendants with a courtesy copy of the complaint prior to service, Lockheed and the in-state defendant were able to remove the case to federal court. See p. 3, *supra*. This change of forum later allowed Lockheed to argue to the Maryland courts that they must use a federal res judicata rule to preclude the second suit, a result that would not have been possible if the first case had been dismissed in California state court.

Second, instead of filing the second lawsuit in Delaware (Lockheed's state of incorporation), whose state courts have rejected the use of a federal res judicata rule, see note 18, *supra*, and where the statute had not run, Semtek filed in Maryland (where Lockheed has its headquarters and where much of the alleged wrongdoing occurred). This choice of forum led to the dismissal of Semtek's action on the basis of the sweeping res judicata effect of a statute-of-limitations dismissal adopted by the Maryland courts in significant part as a result of their interpretation of Fed. R. Civ. P. 41(b) — an interpretation that is, we submit, mistaken. *See* note 22, *infra*, and authorities cited therein.

the statute-of-limitations rules applicable in federal diversity litigation, this Court has emphasized that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court." *Id.* at 109. *See also Holmberg v. Armbrecht*, 327 U.S. 392, 394 (1946) (reaffirming *York*, noting that "a statute of limitation is a significant part of the legal rules which determine the outcome of a litigation"). Likewise, this Court has noted that the "doctrine of *res judicata* is not a mere matter of practice or procedure," but rather "a rule of fundamental and substantial justice." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917).

By contrast, there may be an overriding federal interest in giving a uniform res judicata effect to judgments where necessary to regulate litigant conduct under the Federal Rules of Civil Procedure, thereby arguably obliging state courts "to honor preclusion rules that draw not from adjudication but from procedural penalties." 18 Wright & Miller, *supra*, § 4468, at 658. Examples might include the "failure to assert a compulsory counterclaim" under Rule 13(a), and "dismissals for failure to prosecute or to comply with court orders or rules," for example, under Rule 41(b). *Id.*[22]

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[22] This concern has been articulated most prominently by the Second Circuit in its oft-cited decision in *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962), which barred a litigant from proceeding with a second suit in New York federal court after suffering a Rule 41(b) dismissal for failure to prosecute in California federal court. The particular, and limited context of failure to prosecute that triggered *Kern*'s sweeping language on the strong federal interest in precluding suit in such an instance was later overlooked by some Second Circuit panels. See p. 15 & note 9, *supra*.

Some commentators have questioned the view that the Federal Rules of Civil Procedure in general, and Rule 41(b) in particular, may or should be construed as broadly dictating the preclusive effect of federal judgments and have suggested that the Rules Enabling Act (coupled with the constitutional principles underlying the *Erie* decision) may present a barrier to any such broad construction. *See* 18 Wright & Miller, *supra*, § 4441, at 366 (stating that Rule 41(b) is "clearly inapposite" to the preclusive effect of a statute-of-limitations dismissal); *id.* § 4468, at 658-59; *id.* § 4472, at 732-39; Burbank, *supra*, 71 Cornell L. Rev. at 772-75, 780-83, 791-97; Lilly, *supra*, 54 Ohio St. L.J. at 319-21 & n.113. *See also Reinke v. Boden*, 45 F.3d 166, 170-71 & n.13 (7th Cir.) (noting the "serious criticism" of the line of cases relying on the last sentence of Rule 41(b) to hold that "when successive actions are brought in different federal courts, a determination by the first federal court that the cause of action is barred by the statute of limitations of one state bars a successive action in a second federal court — even though that second court would apply a different statute of limitations, the statute of the state in which it sits."), *cert. denied*, 516 U.S. 817 (1995).

A second option available to the Court would be simply to adopt, as a uniform federal rule governing the res judicata effect of a statute-of-limitations dismissal, the traditional rule that such a dismissal does not preclude suit in another forum with a longer limitations period (at least so long as the rule of the rendering jurisdiction bars only a remedy in that jurisdiction's courts, and not the right itself). See pp. 4-5, 24-25, *supra*.[23]

A third option available to this Court — and, we submit, the least desirable — would be to adopt, again as a uniform federal rule, the opposite rule: the minority rule that a statute-of-limitations dismissal in the initial forum bars another suit in any

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[23] The leading federal court opinion articulating the traditional rule that each forum may apply its own limitations period in deciding the timeliness of an action is Justice Story's opinion in *United States v. Donnally*, 33 U.S. (8 Pet.) 361, 370, 372-73 (1834). *See* 18 Wright & Miller, *supra*, § 4441, at 369 n.9. *See also Townsend v. Jemison*, 50 U.S. (9 Cranch) 407, 413 (1850) ("The rule in the courts of the United States, in respect to pleas of the statutes of limitation has always been, that they strictly affect the remedy, and not the merits."); *Davis v. Mills*, 194 U.S. 451, 453 (1904) ("[T]he ordinary limitations of actions are treated as laws of procedure and as belonging to the lex fori, as affecting the remedy only and not the right.").

This rule has produced "the general conclusion that dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations." 18 Wright & Miller, *supra*, § 4441, at 369. This Court reaffirmed the constitutionality of this traditional choice-of-law approach in *Sun Oil v. Wortman*, 486 U.S. 717 (1989). This is the rule adopted in the Restatement (Second) of the Conflict of Laws § 142(2) & cmt. g, § 143, and it appears to be the majority rule. *But see id.* § 142 & cmts. e & g (Rev. 1989) (noting recent decisions departing from the "right" versus "remedy" analysis).

other forum. This is the rule that was adopted by the Maryland courts below, and in doing so, they followed the reasoning of several courts that have interpreted Fed. R. Civ. P. 41(b) to require such a result. *See* App. 8a, 12a-16a, 19a-25a (principally relying on *Shoup v. Bell & Howell*, 872 F.2d 1178 (4th Cir. 1989), and *Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044 (5th Cir. 1989)). The idea that Rule 41(b) by its terms dictates any particular preclusive effect has received substantial criticism. *See* note 22, *supra*, and authorities cited therein.

In sum, if this Court elects on the merits to modify or overrule its holdings in *Dupasseur* and its progeny, this case provides a perfect vehicle for explicating, for the benefit of the lower federal and state courts, the post-*Dupasseur* approach to be taken in analyzing the various res judicata issues that are relevant to judgments in diversity cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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TABLE OF APPENDICES

APPENDIX A

Decision of the Court of Special Appeals of Maryland, dated September 7, 1999 ..... 1a

APPENDIX B

Order of the Court of Appeals of Maryland denying certiorari, dated December 21, 1999 ..... 35a

APPENDIX C

Memorandum Opinion of the Circuit Court for Baltimore City, dated April 30, 1998, granting defendant's motion to dismiss 36a

APPENDIX D

Order of the U.S. District Court for the Central District of California, dated May 5, 1997, granting defendants' motion to dismiss, and judgment dated May 8, 1997 ..... 48a

APPENDIX E

Order of the U.S. District Court for the Central District of California, dated August 11, 1997, denying Lockheed's motion for injunction 60a

APPENDIX A

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1041
September Term, 1998

SEMTEK INTERNATIONAL INCORPORATED

v.

LOCKHEED MARTIN CORPORATION

Moylan,
Adkins,
Bloom, Theodore R. (Ret., Specially Assigned),

JJ.

OPINION BY MOYLAN, J.

Filed: September 7, 1999

[Page numbering from 736 A.2d 1104 in bold]

[1106] Semtek International Corp. ("Semtek"), the appellant, challenges an Order issued by Judge Joseph H. H. Kaplan in the Circuit Court for Baltimore City, whereby Semtek's Complaint against Lockheed Martin Corporation ("Lockheed"), the appellee, was dismissed on grounds of *res*

judicata. On appeal, Semtek raises the sole issue of whether the trial court erred in dismissing the Complaint. Although Semtek has strained, at least before us if not necessarily before Judge Kaplan, to inject all sorts of peripheral doctrines and issues into the case, the question before us, in essence, is the single issue of

> whether Judge Kaplan was entitled to give preclusive effect to the judgment of a federal district court dismissing Semtek's suit against Lockheed, stating as it did so that the suit was being "dismissed in its entirety on the merits."

Procedural Background

A. *California State Suit Removed to Federal District Court on Ground of Diversity*:

On February 26, 1997, Semtek filed a Complaint against Lockheed in the Superior Court for Los Angeles (hereinafter "the California action"), alleging (1) breach of contract, (2) intentional interference with prospective economic advantage, (3) negligent interference with prospective economic advantage, and (4) civil conspiracy, in relation to Semtek's joint venture with a Russian company for the use of former military satellites for commercial purposes. Lockheed immediately removed the action to the United States District Court for the Central District of California (hereinafter "California District Court") based on diversity of citizenship.

B. *District Court Dismissed Suit and Dismissal Affirmed by Ninth Circuit*:

In the California District Court, Lockheed moved to dismiss Semtek's Complaint based on the expiration of California's two-year Statute of Limitations. On May 8, 1997, the California District Court granted Lockheed's motion and

dismissed the action with prejudice, holding that the causes of action had accrued in August of 1994, thus making the February 26, 1997 Complaint untimely. Three days later, the following Order was issued:

> IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Semtek International Incorporated take nothing on its complaint in this action, that *the action be dismissed in its entirety on the merits* and with prejudice, and that this Judgment be entered forthwith in favor of defendants Lockheed Martin . . . .

(Emphasis supplied).

Semtek appealed that judgment to the United States Court of Appeals for the Ninth Circuit. On February 25, 1999, the Ninth Circuit affirmed the California District Court's dismissal of Semtek's Complaint on Statute of Limitations grounds. *Semtek Internat'l Inc. v. Lockheed Martin Corp.*, No. CV-97-55840, 1999 WL 97355 (9th Cir. Feb. 25, 1999).

C. *Refiling of Suit in Maryland State Court*:

On July 2, 1997, Semtek filed in Maryland another Complaint against Lockheed (hereinafter "the Maryland action"), alleging (1) breach of contract, (2) intentional interference with prospective economic advantage, (3) negligent interference with prospective economic advantage, and (4) civil conspiracy, based on the same purported joint venture between Semtek and a Russian company regarding the use of military satellites. That suit was filed in the Circuit Court for Baltimore City, making the underlying claim subject to Maryland's three-year Statute of Limitations **[1107]** rather than California's two-year Statute of Limitations.

D. *Failed Injunction Attempt in Original Federal District Court*:

In response, Lockheed filed an All Writs Act injunction in the California District Court on July 23, 1997. Lockheed asserted that Semtek was barred from bringing suit in Maryland on the grounds of *res judicata*. Two days later, Lockheed removed the Maryland action to the United States District Court for the District of Maryland (hereinafter "Maryland District Court"), citing the involvement of a federal question as grounds for removal.[1] Specifically, Lockheed maintained that, even though none of Semtek's claims presented a federal question, Lockheed planned to assert the defense of *res judicata* based on the California Federal Court's ruling, thus presenting a federal question for resolution.

Ultimately, the California District Court denied Lockheed's injunctive efforts, holding as follows:

> [T]his Court is not convinced that the single action filed by [Semtek] in Maryland rises to the level of vexatious relitigation which would warrant the use of the rather extreme remedy that Lockheed requests. [Semtek] has not filed subsequent actions that are either "numerous" or "patently without merit." The Court does not view this chronology as one in which the Court is justified in summarily precluding [Semtek's] access to the courts. This Court's prior order did not reach the substantive merits of [Semtek's] tort claims. If another proper forum will afford [Semtek] the opportunity to fully litigate the merits of its causes of action,

[1] Lockheed could not remove the action based on diversity of citizenship because Lockheed is considered a Maryland citizen.

> without applying a statutory or *res judicata* bar, the Court does not find it appropriate to bar [Semtek] from proceeding in that forum.

(Citation omitted).

E. *Removal From Local Federal District Court to Maryland State Court*:

After the California District Court's ruling, Lockheed filed a Motion to Dismiss the Maryland action in the Maryland District Court on grounds of *res judicata*. Semtek, on the other hand, sought to have the Maryland District Court remand the action to the Circuit Court for Baltimore City, alleging lack of subject matter jurisdiction in the Maryland District Court. On December 31, 1997, the Maryland District Court granted Semtek's motion to remand the case to the circuit court on the ground that federal removal could not be predicated on an alleged federal affirmative defense. *Semtek Internat'l, Inc. v. Lockheed Martin Corp.*, 988 F. Supp. 913 (D. Md. 1997). The Maryland District Court did not rule on Lockheed's Motion to Dismiss.

The *Res Judicata* Ruling

Thereafter, Lockheed filed another Motion to Dismiss in the Circuit Court for Baltimore City, again asserting that the suit was barred by *res judicata*. A hearing was held on April 23, and on April 30, 1998, the trial court granted Lockheed's Motion to Dismiss. The thorough and well-researched opinion of Judge Kaplan explained:

> The central issue that this court has been asked to consider is the preclusive effect of a federal dismissal on a subsequent identical state court action . . . . Pursuant to the clear language of the Federal Rules of Civil

Procedure and federal preclusion law, federal law determines the preclusive effect of a prior federal judgment.

[1108] * * *

The Court is convinced that Federal Rule of Civil Procedure 41(b), Fourth, Fifth, Ninth Circuit case law and the *Andes [v. Paden, Welch, Martin & Albano* 897 S.W.2d 19 (Mo. 1995)] holdings mandate this Court *to find the judgment of the District Court for the Central District of California*, dismissing Semtek's claims on statute of limitations grounds, *a final judgment on the merits, and therefore prohibits Semtek from relitigating these claims in Maryland due to res judicata*. Federal law does not permit [Semtek] to shop indefinitely for a forum that will give credence to their arguments. [Semtek] had its day in Court for this action and apparently was not satisfied with [the California District Court's] decision. Semtek could have originally filed this suit in Maryland state court, but instead filed this action in California. Thus, Semtek should be bound by California's two year statute of limitations and [the California District Court's] decision dismissing the action. Lockheed should not be forced to follow [Semtek] from state to state to defend an action previously decided in another jurisdiction. Accordingly, the Court agrees with Lockheed in that the fairest and most efficient use of federal and state judicial resources mandates that this Court grant Lockheed's Motion to Dismiss Semtek's Maryland Complaint with prejudice.

(Emphasis supplied). This timely appeal followed.

The propriety of Judge Kaplan's dismissal of Semtek's suit on the ground o[f] *res judicata* is the sole issue before us on this appeal.

Preclusive Effect of Federal Judgment Determined by Federal Law

Semtek argues that our analysis of whether the Maryland action is barred on *res judicata* grounds should be dictated by California state law and that Judge Kaplan erroneously applied federal law when making his determination. We disagree.

In *Kent County Bd. of Ed. v. Bilbrough*, 309 Md. 487, 494 (1987), the Court of Appeals unambiguously stated that "federal law determines the effects under the rules of *res judicata* of a judgment of a federal court," quoting with approval Restatement (Second) of Judgments, § 87 (1982). *See also Douglas v. First Security Federal Savings Bank, Inc.*, 101 Md. App. 170, 179 (1994). The case law is well settled that it is federal law that determines the preclusive effect of a federal judgment. *Brooks v. Arlington Hosp. Ass'n*, 850 F.2d 191, 195 (4th Cir. 1988); *Agrilectric Power Partners, Ltd. v. General Electric Co.*, 20 F.3d 663, 664-65 (5th Cir. 1994); *Luxford v. Dalkon Shield Claimants Trust*, 978 F. Supp. 221, 223 n.6 (D. Md. 1997); *Green v. Kadilac Mort. Bankers, Ltd.*, 936 F. Supp. 108, 114 (S.D.N.Y. 1996); *Bostic v. Allstate Ins. Co.*, 866 F. Supp. 959, 959 (W.D. Va. 1994).

After quoting from *Kent County Bd. of Educ. v. Bilbrough*, Judge Kaplan ruled that federal law would determine the preclusive effect in Maryland of the May 8, 1997 judgment of the California District Court:

> Accordingly, because Semtek does not deny that the United States District Court for the Central District of California dismissed every claim contained in Semtek's current Maryland complaint with prejudice on statute of limitations grounds, federal law must be

employed to determine the preclusive effect of this prior federal court judgement.

Federal Rule of Civil Procedure 41(b)

The applicable federal law to which Judge Kaplan then turned in his Memorandum Opinion was Federal Rule of Civil Procedure 41(b), which provides, in pertinent part:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a **[1109]** party under Rule 19, *operates as an adjudication upon the merits*.

(Emphasis supplied). In applying Federal Rule 41(b) to the case at hand, Judge Kaplan further ruled:

> The plain language of the rule requires that the dismissal of the Plaintiff's California action be deemed an adjudication on the merits and warrants dismissal of Semtek's duplicative Maryland complaint with prejudice.

The prior decision that Judge Kaplan afforded preclusive effect was the May 8, 1997 judgment of the California federal district court. That judgment, by its express language, dismissed Semtek's suit **IN ITS ENTIRETY ON THE MERITS AND WITH PREJUDICE**. In the immediate wake of that judgment, Semtek did not seek to alter, amend, or revise the wording of the judgment in any way. Semtek appealed the merits of the decision to the Ninth Circuit. On February 25, 1999, the Ninth Circuit affirmed, on the merits, the District Court's dismissal of Semtek's complaint. The Ninth Circuit opinion volunteered no adverse comment on the wording of the dismissal order.

The Federal Court's Subsequent Reference To Its Earlier Judgment

In an effort to fend off the preclusive effect of the May 8, 1997 judgment, Semtek argues that the same federal district court that issued the May 8, 1997 dismissal order has, in effect, subsequently and significantly ameliorated that order. Judge Kaplan did not accept that argument nor do we.

After Semtek had refiled its suit in the Circuit Court for Baltimore city, one of the defensive maneuvers of Lockheed was to go back to the federal district court in California and to move, on July 23, 1997, for an All Writs Act injunction seeking to bar Semtek from bringing the action in Maryland on the grounds of *res judicata*. On August 11, 1997, United States District Court judge Audrey B. Collins, the same judge who had issued the earlier order of May 8, 1997, denied Lockheed's request for an injunction. In her 14-page Opinion and Order Judge Collins pointed out that the decision to issue an injunction under the All Writs Act, 28 U.S.C. § 1651(a), is discretionary and is "an extraordinary remedy that should be narrowly tailored and rarely used." *Moy v. United States*, 906 F.2d 467, 470 (9th Cir. 1990). Judge Collins concluded that "because the resolution of the *res judicata* issue is far from obvious, the Court declines to determine the issue." She reasoned that the preclusive effect of the earlier action "is properly left to the Maryland state or district court." She expressly stated that "Lockheed's argument that the doctrine of *res judicata* bars the Maryland case may be brought before the proper court in a motion to dismiss or motion for summary judgment based on *res judicata* preclusion."

In passing, Judge Collins observed, "This Court's prior order did not reach the substantive merits of Plaintiff's tort claims. If another proper forum will afford Plaintiff the opportunity to fully litigate the merits of its cause of action, without applying a statutory or *res judicata* bar, the Court does not find it appropriate to bar plaintiff from proceeding in that

forum." That first quoted sentence is the language on which Semtek now relies for its proposition that the judgment of May 8, 1997, has now been effectively altered.

The Inconsequentiality of *Dicta*

Judge Collins, however, also stated very emphatically that

> the Court must reiterate that these issues are properly decided by the proper court in Maryland, and *any dicta or other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of the issues of removal jurisdiction and res judicata preclusion.*

(Emphasis supplied).

Judge Kaplan rejected Semtek's argument and abided by Judge Collin's wishes **[1110]** with respect to the non-persuasive status of her passing comments.

> Semtek argues that Rule 41(b) should not be applied because the United States District Court for the Central District of California's order denying Lockheed's request for a permanent injunction states that the court had not reached the "substantive merits" of Semtek's claims.
>
> Plaintiff's argument is flawed for several reasons. First and foremost, neither party stated an objection to the Order signed by Judge Collins dismissing the United States District Court for the Central District of California action, in its entirety on the merits and with prejudice. This Order states that, "IT IS ORDERED, ADJUDGED AND DECREED, that Plaintiff Semtek International Incorporated take nothing on its complaint in this action, that the action can be dismissed in its entirety on the merits and with prejudice, and that the judgment be entered forthwith in favor of the defendants . . . ." Secondly, Judge Collins explicitly stated in footnote 13 of her opinion that . . . "the Court must reiterate that these issues are properly decided by the proper court in Maryland, and any dicta or other discussion within this opinion should not be cited or argued [as] persuasive authority for the Maryland courts' consideration of . . . *res judicata* preclusion." Furthermore, the District Court expressly requested that the parties not cite any dicta contained in that order.

Self-evidently, Judge Kaplan was as free to disregard Judge Collins's characterization of her earlier order in the course of later dicta, indeed to disregard her characterization at her express direction, as he would have been free to disregard a similar characterization attributed to her in the course of cocktail party conversation. We see no error.

The Effort to Amend the Federal Judgment

The very argument in this regard that Semtek now makes was also made to both the Ninth Circuit and the federal district court in California. Early in the pendency of Semtek's appeal of Judge Kaplan's decision to this Court, Semtek sought to have the federal district court amend its judgment of May 8, 1997 in order to correct the allegedly "clerical" mistake of seeming to have dismissed Semtek's suit "with prejudice and on the merits" and to "clarify" the May 8, 1997 judgment by deleting any reference to its having been "on the merits."

The memoranda in support of both 1) Semtek's motion in the Ninth Circuit, filed on October 5, 1998, and 2) Semtek's

motion in the federal district court, filed October 19, 1998, recite at length 1) Judge Kaplan's decision in the Circuit Court for Baltimore City to dismiss Semtek's suit on the ground of *res judicata*, 2) Judge Kaplan's reliance on the fact that the May 8, 1997 federal district court judgment stated that it was "on the merits," and 3) Judge Collins's later characterization of her May 8, 1997 judgment. With full knowledge of all the facts and of the impact of those facts, both the Ninth Circuit and the federal district court, albeit on procedural grounds, denied Semtek's motions "to amend," "to correct," or "to clarify" the judgment of May 8, 1997. That judgment is today exactly as it was on May 8, 1997. "The moving finger writes and, having writ, moves on."

Judge Kaplan's Further Analysis

Quite aside from *Kent County Board of Education v. Bilbrough* and Federal Rule of Civil Procedure 41(b), Judge Kaplan found independent support for his decision in the dispositive cases of *Shoup v. Bell & Howell*, 872 F.2d 1178 (4th Cir. 1989) and *Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, *reh'g denied en banc*, 880 F.2d 818 (5th Cir. 1989). While he "recognize[d] that Fourth Circuit and Fifth Circuit cases are not binding on Maryland State Courts," he nonetheless concluded that they "provide sufficient persuasive authority on the proper application of federal preclusion principles **[1111]** governing the resolution of this Motion."

Shoup v. Bell & Howell

Although *Shoup* and *Thompson Trucking* are, to be sure, not binding on Maryland courts, we, like Judge Kaplan, find them to be highly persuasive authority. In *Shoup*, as in this case, suit was originally brought in a state court, in that case in Pennsylvania. In that case, as in this, the suit was removed to

the federal district court on the basis of diversity of citizenship. In that case, as in this, the defendant moved to have the suit dismissed because the state statute of limitations had run before the suit was originally filed in the state court. The Pennsylvania statute of limitations in that case, as the California statute of limitations in this case, was two years. In that case, as in this, the federal district court dismissed the suit because the underlying state statute of limitations had run.

In that case, as in this, the plaintiff refiled essentially the same suit in the Circuit Court for Baltimore City in an obvious effort to take advantage of Maryland's more generous three-year statute of limitations. In that case, unlike this one, the case was again moved to federal district court on the basis of diversity of citizenship.[2] In that case, as in this, the defendant moved to have the subsequently filed suit dismissed on the ground of *res judicata*.

Whereas in this case Judge Kaplan granted the defendant's *res judicata* motion, in that case Judge Walter E. Black, Jr. denied that defendant's *res judicata* motion. Whereas the unsuccessful defendant there appealed to the United States Court of Appeals for the Fourth Circuit, the unsuccessful plaintiff here has appealed to us. The Fourth Circuit was then, as we are now, faced with the preclusive effect of an earlier federal dismissal of a diversity case as time-barred on a subsequent refiling of essentially the same action in a new forum. The only difference between the *Shoup* case and the case now before us is that the new forum in that case was a second federal court whereas the new forum in this case was a Maryland state court.

In the *Shoup* case, as in this case, the earlier judgment that was urged as one having preclusive effect was the judgment of a federal district court, in that case sitting in Pennsylvania as in this case sitting in California. Before stating the question there,

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[2] It was there consolidated with an identical suit that had simultaneously been filed in the United States District Court for the District of Maryland.

which is almost precisely the same as the question here, the *Shoup* opinion held that federal law determines the preclusive effect of an earlier federal judgment:

> We note at the outset that *federal, not state, law determines the preclusive effect of a prior federal judgment, including the question of whether that judgment was on the merits*. It is true that plaintiff filed her Maryland lawsuit within that state's three-year limitations period for personal injury actions. That fact, however, does not determine whether an earlier identical action between the parties, found to be time barred because it was not filed within Pennsylvania's two year statute of limitations, precluded the plaintiffs from bringing the Maryland lawsuit.

872 F.2d at 1179 (citations omitted; emphasis supplied).

At the District Court level in *Shoup*, Judge Black had ruled, essentially as Semtek argues here, that "Maryland law regards the Pennsylvania [California] statute of limitations as procedural," 872 F.2d at 1179, and, therefore, as no bar to a subsequent suit in a Maryland Court "where the Pennsylvania [California] statute is inapplicable." *Id.* The Fourth Circuit opinion disagreed, reasoning that it is the federal judgment itself that is the critical point for measuring possibly preclusive effect and not some more anterior and peripheral state law that may have been **[1112]** considered in arriving at the federal judgment. *Shoup* also pointed out that whatever preclusive effect an earlier federal judgment may have is not diminished because it was rendered in a diversity case:[3]

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[3] The case law is well settled that the preclusive effect of a federal judgment is not in any way diluted because the federal case happens to be a diversity of citizenship case and that this principle is not in any way in conflict with the so-called "*Erie* Doctrine" established by *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In *PRC Harris v. Boeing Co.*, 700 F.2d 894, 897, n.1 (2nd Cir. 1983), the Second Circuit observed:

> While state law certainly controls the rights and duties of the parties in a federal action founded upon diversity of citizenship, *Erie R. Co. v. Tompkins* (1938), this circuit has recognized that "*whether a federal court sits in diversity or has some other basis of jurisdiction, questions of the effect and scope of its judgment involve the power of the federal tribunal itself, and are not varied*

> Harris asserts that application of Rule 41(b) to dismissals on statute of limitations grounds in a diversity case would raise potential constitutional problems under the "Erie doctrine". . . because it would have the effect of abrogating state substantive law. This court explicitly considered and rejected such a claim in *Kern v. Hettinger*, noting that while state law controlled the rights and obligations of the parties, determining the *res judicata* effect that will be given the judgment of a federal court is distinctively a matter of federal law.

(Citations omitted).

In *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962), the Second Circuit also pointed out:

> One of the strongest policies a court can have is that of determining the scope of its own judgments. It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. The rights and obligations of the parties are fixed by state law. These may be created, modified and enforced by the state acting through its own judicial establishment. But we think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights. The Erie doctrine is not applicable here.

(Citations omitted). *See also Cemer v. Marathon Oil Co.*, 583 F.2d 830, 831 (6th Cir. 1978).

> *merely because state rules of decision underlie the judgment." The judgment of a federal court is no less a federal judgment because it was rendered in diversity. "Federal law determines the effects under the rules of res judicata of a judgment of a federal court,"* Restatement (Second) of Judgments § 87 (1982), just as in a state court the law of the state in which the judgment was rendered determines the preclusive effect a federal court must give the judgment. Any other result would consign the effect of federal judgments to the uncertainties of state law in whatever jurisdiction a subsequent suit happened to be brought.

872 F.2d at 1179-80 (citations omitted; emphasis supplied).

Full Faith and Credit:
To Whom and To What?

The misconception the *Shoup* opinion was attempting to overcome is the fundamental flaw that permeates Semtek's argument in this case. Semtek stubbornly continues to ignore the **May 8, 1997 judgment** of the federal district court as the source of preclusion in this case and to try to look behind it to anterior California state law. There was no California state judgment in this case. Although the federal district court may have considered some underlying California state law, the federal judgment did not thereby become a California state judgment nor lose its status as a federal judgment.

Semtek nonetheless persistently argues as if there existed some ethereal and transcendent California state judgment to which Maryland should now extend "full faith and credit" under Article IV, § 1 of the United States Constitution. It has confected an incorporeal version of the **[1113]** "full faith and credit" doctrine, by which full faith and credit should be

extended to a hypothetical judicial proceeding in California that never occurred. Semtek wants Maryland to extend full faith and credit to what, in Semtek's opinion, a California state court **WOULD HAVE DONE, HAD THE SUIT ACTUALLY BEEN TRIED** in a California state court, which it was not. Article IV, § 1, however, concerns actual "Judicial Proceedings" in another jurisdiction and not hypotheticals. Except for narrative purposes, the State of California and the state law of California do not figure into the preclusion issue now before us.

It is in this regard that Semtek reads into the opinion of this Court in *Osteoimplant Technology v. Rathe Productions*, 107 Md. App. 114, 666 A.2d 1310 (1995), a meaning that we never intended to convey. In *Osteoimplant* a judgment was rendered against a defendant in the United States District Court for the Southern District of New York. The judgment was subsequently recorded in the Circuit Court for Baltimore County so that garnishment proceedings could be initiated against the judgment-debtor. In that court, however, the judgment-debtor "filed a motion to vacate the New York federal court judgment." 107 Md. App. at 117. Our holding in *Osteoimplant* was that, as a general rule, "the judgment is only subject to reopening in the court which rendered" it. 107 Md. App. at 117-18.

Prior to entering into an analysis of the actual issue in that case, an issue not here pertinent, we prefaced that analysis with a brief one-paragraph preamble to signal that we were about to deal with the general subject of full faith and credit:

> Our analysis begins with Article IV, § 1 of the United States Constitution, which mandates that States give "full faith and credit" to each others' acts, records, and judicial proceedings. The United States Congress has prescribed, as authorized under the Full Faith and Credit Clause, the manner in which the Clause is to be given effect. 28

> U.S.C. § 1738 (1988). Our courts are required to give full faith and credit to a judgment of a Federal court located in another state as a judgment issued by a State court within whose jurisdiction that Federal court is located. *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 645, 20 S. Ct. 506, 508-09, 44 L. Ed. 619 (1900).

107 Md. App. at 119.

Our purpose, we thought, was clear. Our first sentence referred to the obvious starting point of the Full Faith and Credit Clause of the United States Constitution. That constitutional provision, however, only expressly mandates full faith and credit among the states and not between the states and the federal government. In *Osteoimplant*, however, we were dealing with a judgment from a federal court and some further explanation was therefore required as to why full faith and credit was due to it.

Our second sentence made reference to the statutory Full Faith and Credit Act, now codified as 28 U.S.C. 1738, as an extension of the full faith and credit principle to the relationship between the federal courts and the state courts. Reference in that preamble was also made to the Supreme Court decision of *Hancock National Bank v. Farnum*, 176 U.S. 640 (1900), which elaborated on full faith and credit between the states and the federal courts.

Having thus established our major premise and our minor premise, our completion of the syllogism with a statement of the obvious conclusion should have been clear: Maryland courts will give full faith and credit to a judgment of a federal court sitting in another state as surely as they will give full faith and credit to a judgment of the state court itself. With that preamble thus having established the context, we went on to discuss the full faith and credit that was due in that case to the United States District Court for the Southern District of New York. *And see Smith Pontiac v. Mercedes,* **[1114]** 123 Md.

App. 498, 503, 719 A.2d 993 (1998).

Our conclusion, in that preamble, that we would treat the judgment of a federal court sitting in another state just as we would treat a judgment of the state court itself, to wit, with equal deference, was by no means a statement that we would treat the federal judgment **AS IF IT WERE** a judgment of the state court. Such an issue was not remotely before us in *Osteoimplant* and the proposition for which Semtek cites *Osteoimplant* never crossed our minds.

In retrospect, it might have been more artful if in our third sentence we had said "just as to" a judgment issued by a state court instead of "as" a judgment issued by a state court, but in its unmistakable context that meaning should have been clear. Appellate opinions are not chiseled in marble and the inadvertent difference between "as" and "just as to," unsupported by any other indication, simply will not hold the weight that Semtek seeks to place upon it. To refer, moreover, to this incidental and possibly slack phrasing as the "holding" of *Osteoimplant* is deliberately misleading.

The *Shoup* Ruling

The *Shoup* opinion went on to point out that, contrary to Judge Black's ruling in the District Court, Federal Rule of Civil Procedure 41(b) articulates the federal preclusion principle that a dismissal on statute of limitations grounds constitutes an adjudication on the merits:

> *The plain language of the Rule indicates that the dismissal of plaintiffs' Pennsylvania action on statute of limitations grounds is an adjudication on the merits.* The federal court in Pennsylvania did not otherwise specify the dismissal to be "without prejudice," and the Shoups failed to move the court, pursuant to Fed.R.Civ.P. 59(e) or 60(b)(6), to specify that the judgment was "without prejudice."

Moreover, the dismissal was not one "for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19," nor was it a dismissal for want of a proper case or controversy, which some courts have held to be within the jurisdictional exception of Fed.R.Civ.P. 41(b).

Numerous courts have held that a Rule 41(b) limitations dismissal is a judgment on the merits. In a case analogous to the present one, *PRC Harris*, 700 F.2d 894 (2d Cir. 1983), plaintiffs brought an action in New York state court against Boeing identical to a federal action in Washington dismissed earlier on statute of limitations grounds. That case, like this one, was removed to federal court. The Second Circuit affirmed the judgment of the district court in Boeing's favor, holding that a "dismissal for failure to comply with the statute of limitations will operate as an adjudication on the merits . . ." The court added that Rule 41(b) dictates this result because *"all but certain enumerated dismissals will be considered 'on the merits,' and the Rule does not exempt a dismissal on statute of limitations grounds from its general operation."* We find this reasoning compelling.

872 F.2d at 1180 (citations omitted; emphasis supplied).

The reasoning of the *Shoup* opinion, unlike the holding of the *Shoup* opinion, is not limited to situations where the second forum also happens to be a federal forum. The rationale is more general in its energizing logic:

> Federal law, however, does not permit a plaintiff to shop indefinitely for favorable

> statutes of limitations in every state where personal jurisdiction over a defendant might be found. We need not ponder all the factors that may have led plaintiff to file first in a Pennsylvania forum, for we are not at liberty to vary the principles of preclusion to accommodate them. The doctrine of res judicata "'is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should **[1115]** be cordially regarded and enforced by the courts.'"

872 F.2d at 1182.

Although the incremental preclusive effect is redundant, the original judgment in our case is actually more foreclosing than was the original judgment in *Shoup*. In that case, the original dismissal of the suit was silent as to whether it was "on the merits" and "with prejudice." Under Civil Rule 41(b), however, it was deemed to be so in the absence of any indication to the contrary. In our case, by contrast, the judgment of the United States District Court was expressly stated to be "on the merits and with prejudice."

Thompson Trucking v. Dorsey Trailers

Equally persuasive, both to Judge Kaplan and to us, is the Fifth Circuit decision of *Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, *reh'g denied en banc*, 880 F.2d 818 (5th Cir. 1989). In *Thompson Trucking*, as in this case, suit was filed originally in a state court, in that case Louisiana. In that case, as in this, the case was moved to a federal district court on the ground of diversity of citizenship. In that case, as in this, the federal diversity action was dismissed "with prejudice" because the underlying state statute of limitations

(the Louisiana one-year statute) had run. In that case, more anticipatorily than in this, a second and duplicative suit had already been filed in the United States District Court for the Southern District of Mississippi before the suit earlier removed to the United States District Court for the Western District of Louisiana dismissed. The state of Mississippi had a six-year statute of limitations.

In that case, as in this, the defendants ultimately moved to have the second suit dismissed on the ground of *res judicata*. In that case, unlike in this one, the federal district court in Mississippi denied the motion to dismiss. 677 F. Supp. 478 (S.D. Miss. 1988). In an earlier round of litigation in this case, Semtek relied heavily on that federal district court decision.

Holding that the preclusive "effect of a prior federal diversity judgment is controlled by federal rather than state *res judicata* rules," 870 F.2d at 1045, the Fifth Circuit reversed. It posed the question before it as "whether the Louisiana federal district court's dismissal of Thompson's action on prescriptive grounds was a final judgment on the merits for *res judicata* purposes." *Id.* Persuaded by the reasoning of both *Nilsen v. City of Moss Point*, 674 F.2d 379 (5th Cir. 1982), *aff'd on rehearing*, 701 F.2d 556 (1983) (en banc) and *Mathis v. Laird*, 457 F.2d 926 (5th Cir. 1972), the Fifth Circuit "determined that the dismissal with prejudice by the Louisiana federal district court of Thompson's claims because they had prescribed was a final judgment on the merits" and that "Thompson's subsequent action filed in Mississippi federal district court is barred under the doctrine of *res judicata*." 870 F.2d at 1046.

A small part of the Fifth Circuit's rationale dealt, to be sure, with the intramural value of *res judicata* within the four corners of the federal system, but the major thrust of the reasoning was of more universal import:

> Multiple litigation is costly, both in terms of the expense incurred by a party who must defend against the same claim in different courts as well as the expense resulting from

> the inefficient use of the federal judicial machinery. Allowing plaintiffs who fail to comply with applicable statutes of limitations to move to the next state over would have the undesirable effect of encouraging forum shopping and rewarding dilatory conduct.
>
> In that regard, if *res judicata* were unavailable in the instant case, the defendants, having once engaged counsel in Louisiana, would be faced with the prospect of again hiring counsel in Mississippi to defend against the same action one more time. Additionally, the prospect of compelling the already overburdened district courts of the United **[1116]** States to hear the same claims over and over again in different states is, in our view, unappealing. If Thompson had elected to do so, he could have filed suit in Mississippi to begin with and thereby availed himself of that state's longer period of prescription. Thompson chose, however, to file first in Louisiana and accordingly he was responsible for compliance with that state's prescriptive period.

Id.

The Dominant Theme of the Federal Cases

In addition to the Fourth and Fifth Circuits, almost all of the United States courts of appeals that have considered this question have reached the same conclusion, to wit, that the dismissal of a suit by a federal court based on the running of the statute of limitations will, absent a clear directive to the contrary, be deemed a dismissal on the merits that will bar the filing of a subsequent suit on the ground of *res judicata*. See *Kale v. Combined Ins. Co. of America*, 924 F.2d 1161, 1164,

cert. denied, 502 U.S. 816 (1st Cir. 1991) ("It is beyond peradventure that the dismissal of a claim as time-barred constitutes a judgment on the merits, entitled to preclusive effect."); *Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) ("Our survey of recent cases suggests a clear trend toward giving claim-preclusive effect to dismissals based on statutes of limitations."); *PRC Harris v. Boeing Co.*, 700 F.2d 894, 896-97, *cert. denied*, 464 U.S. 936 (2nd Cir. 1983) ("The longstanding rule in this Circuit . . . is that a dismissal for failure to comply with the statute of limitations will operate as an adjudication on the merits, unless it is specifically stated to be without prejudice."); *Kern v. Hettinger*, 303 F.2d 333, 339-40 (2nd Cir. 1962) ("[I]n view of the unequivocal language of Rule 41(b) and the absence of the words 'without prejudice,' we must and do decide that the dismissal was on the merits and that it was intended to be on the merits."); *Haefner v. County of Lancaster*, 543 F. Supp. 264, 266 (E.D. Pa. 1982), *aff'd*, 707 F.2d 1401 (3d Cir. 1983) ("[D]ismissal of a suit as time-barred establishes a *res judicata* bar."); *Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) ("A summary judgment on the basis of the defense of statute of limitations is a judgment on the merits."); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978); *Myers v. Bull*, 599 F.2d 863, 865, *cert. denied*, 444 U.S. 901 (8th Cir. 1979) (Petitioner's attempt to relitigate claims "barred by the *res judicata* effect of the district court's decision . . . that the claims were brought outside the period of the applicable statute of limitations."); *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1331 n.3 (9th Cir. 1981); *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29, *cert. denied*, 502 U.S. 952 (10th Cir. 1991) ("We therefore agree with the Sixth Circuit and other circuits in holding that a dismissal on limitations grounds is a judgment on the merits.").

Pertinent also is the observation of the Supreme Court in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228, 115 S. Ct. 1447, 131 L. Ed. 2d 328, 348 (1995):

> *The rules of finality*, both statutory and judge made, *treat a dismissal on the statute-of-limitations grounds* the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: *as a judgment on the merits.*

(Emphasis supplied). *See also* 5 J. Moore, *Moore's Federal Practice*, § 41.14 (2d ed. 1987).

The Seventh Circuit: A Minor Counter-theme

The holding of the Seventh Circuit in *Reinke v. Boden*, 45 F.3d 166, *cert. denied*, 516 U.S. 817 (7th Cir. 1995), is not out of line with the other federal cases listed above, although the tone of the opinion reflects an inclination **[1117]** to confine the preclusive effect of Rule 41(b) to the intramural setting of two successive federal actions.

In the *Reinke* case itself, however, the forum wherein the suit was initially dismissed as time-barred under Minnesota's six-year statute of limitations was not a federal court but a Minnesota state court. The suit was subsequently refiled, as a diversity action, in the federal district court for Northern Illinois. The defendants there moved to dismiss the suit on the basis of *res judicata*. The issue was what preclusive effect should have been given by the federal district court in Illinois to the earlier dismissal of the suit by a Minnesota state court on the basis of limitations.

Art. IV, Sect. 1's "Full Faith and Credit" requirement applies, of course, only to the states and not to the federal courts. The federal statutory counterpart of the full faith and credit clause is 28 U.S.C. § 1738. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 463, 102 S. Ct. 1883, 72 L. Ed. 2d 262, 268 (1982), the Supreme Court explained:

> As one of its first acts, Congress directed that all United States courts afford the same full faith and credit to state court judgments that would apply in the State's own courts. Act of May 26, 1790, ch 11, 1 Stat 122, 28 U.S.C. § 1738.

Pursuant to that statutory full faith and credit provision, the federal district court in Illinois was enjoined to extend to the earlier dismissal of the suit in Minnesota on limitations grounds whatever preclusive effect Minnesota state law indicated the dismissal should enjoy. "28 U.S.C. § 1738 . . . 'requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.'" *Reinke*, 45 F.3d at 167.

The Seventh Circuit concluded that Minnesota is among the majority of states that treat the limitations defense as "procedural" in nature and of no preclusive effect on subsequent filings in other jurisdictions, state or federal.

> Because Minnesota adheres to this traditional view of the procedural nature of statute[s] of limitations, the Minnesota courts' conclusion that the cause of action is barred by its statute of limitations is, on its face, nothing more than a determination that the action is time-barred in Minnesota. A Minnesota judgment holding that the Minnesota statute of limitations bars the maintenance of a suit in Minnesota says nothing about whether Illinois will allow the suit.

45 F.3d at 170.

Deferring to the non-preclusive approach of the Minnesota state court in which the judgment of dismissal had been rendered, the Seventh Circuit held that the subsequent diversity action in the federal district court in Illinois was not barred by

res judicata. The preclusion law of the first forum controlled the *res judicata* ruling of the second forum.

Before the Seventh Circuit, however, the defendants had strongly pushed the argument that Minnesota referred to a limitations dismissal as being "on the merits" and that that linguistic usage, even if in a different context, should somehow "trump" Minnesota's otherwise clear position on the non-preclusive nature of such a dismissal. It was in making that argument that the defendants referred to the whole body of Rule 41(b) case law and it was in deflecting that argument that the Seventh Circuit effectively consigned that whole body of Rule 41(b) case law to its literal intramural context. That whole discussion, however, was simply part of a very tangential argument.[4] **[1118]**

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[4] The Seventh Circuit primarily rejected the defendants' argument in this regard by pointing out that Minnesota clearly did not intend for its use of the phrase "judgment on the merits" to have the same preclusive effect that that same phrase has been given within the context of Federal Rule of Civil Procedure 41(b). The *Reinke* opinion described the broader connotation that the defendants sought to attribute to the phrase:

> The district court was of the view that this straightforward analysis was complicated by the fact that Minnesota, as a matter of its internal procedural rules, has termed a dismissal on the ground of statutes of limitations to be a "judgment on the merits." This rule, according to the district court's analysis, trumps Minnesota's frank and explicit acknowledgment that statute of limitations matters are procedural and that a forum ought to use its own procedure.

45 F.3d at 170.

The Seventh Circuit then pointed out that the Minnesota Court of Appeals obviously did not intend for the phrase to be given so sweeping a preclusive effect:

> Although the Minnesota Court of Appeals has noted that a statute of limitations dismissal amounts to a dismissal on the merits, it has not done so in the context of the intersystem situation presented here. . . . Moreover, in this very case, the state trial court in Minnesota noted that it was "well-settled in our

The square holding of *Reinke* was that the second forum, where *res judicata* is being considered, will defer to the preclusion law of the first forum, where the judgment of dismissal was initially and formally rendered. With respect to the potential impact of the first forum's dismissal of a suit as time-barred on a *res judicata* question in the second forum, it is the first forum that calls the tune. That first forum in *Reinke* was a Minnesota state court, and the second forum was guided by Minnesota state law. The first forum in our case was not, as Semtek would like to hypothesize it, a California state court. It was the United States District for the Central District of California where federal preclusion law, not California preclusion law, prevails.

Extending the Rule
Neither Mandated Nor Forbidden

In attempting to deflect the impact of both *Shoup* and *Thompson Trucking*, Semtek several times makes the inaccurate assertion that those cases are "expressly limited" to the intramural situation where the second forum in which preclusion is sought is also a federal forum. Such a statement is flatly wrong. The rule of those cases, to be sure, is not "expressly extended" to a state court as the second forum, but neither is it "expressly limited" to a second federal forum. With respect to the possible extension of their preclusive holdings to a state court, both *Shoup* and *Thompson Trucking* were

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courts that the limitation of time statutes generally are procedural and that the law of the forum is applied." . . . In short, the Minnesota courts in this litigation took the view that statutes of limitations are procedural and that each forum ought to apply its own. It is difficult to attribute to such a court the intent to make its statute of limitations decision binding on all other jurisdictions.

45 F.3d at 172 (citation omitted).

completely silent. They "expressed" nothing by way of further extension or limitation, for such an issue was not remotely before them.

We find, as did Judge Kaplan, that the policy considerations and the logic undergirding those decisions makes it just as reasonable to extend the preclusive effect of an earlier federal judgment on the merits to a state second forum as to a federal second forum. In response to Semtek's effort to emphasize the jurisdictional distinction, Judge Kaplan ruled:

> The Court does not deny the existence of these distinctions. However, *these distinctions are without difference*. The Fourth Circuit's holding in *Shoup* illustrates that the uniform application of federal preclusion law to prior federal judgments is a prerequisite to preserving the integrity of the federal system. *For the purpose of this analysis, it is irrelevant whether Plaintiff decided to file the second action in state or federal court.*

(Emphasis supplied). We affirm that ruling.

A State Court Looks to Federal Preclusion Law

Andes v. Paden, Welch, Martin & Albano, 897 S.W.2d 19 (Mo. App., W.D. 1995), was a case in which a state court agreed, relying in significant measure on the opinion **[1119]** of the Fourth Circuit in *Shoup*, that a federal dismissal based on limitations grounds would have preclusive effect on a suit still pending in a state court. In *Andes*, the plaintiff sued the defendants in both the Missouri state court and in the United States District Court for an invasion of privacy involving an illegal wiretap. The suit in federal court was dismissed on the ground that the two-year statute of limitations contained in the Federal Wiretap Act had run. On the basis of that dismissal, the defendants then sought to have the suit in the Missouri state

court dismissed on the ground of *res judicata*. Although the legal bases for the two suits were statutorily distinct, the underlying conduct was essentially the same and the two suits were deemed to be on the same cause of action. The trial judge granted the motion to dismiss. The issue before the Missouri Court of Appeals was precisely the issue now before this Court:

> In order for a judgment to operate as a bar to subsequent proceedings, the judgments must have been on the merits. Therefore, *the threshold issue presented here is whether the federal dismissal based on the statute of limitations is a judgment "on the merits" for res judicata purposes.*

897 S.W.2d at 21 (emphasis supplied).

The Missouri Court of Appeals looked in some depth at the Fourth Circuit decision in *Shoup* and then catalogued a large number of federal decisions going the same way. Even though the federal decisions were not literally binding on it, the Missouri Court of Appeals was nonetheless persuaded to hold that the federal dismissal would have preclusive effect in the state courts of Missouri:

> Therefore, we hold that a federal dismissal based on the expiration of the statute of limitations is "on the merits" and may have preclusive effect on a subsequent action filed in the state courts of Missouri, even though the substantive issues of the case have not been addressed.

897 S.W.2d at 23.

The *Erie* Doctrine

Semtek's argument based on an alleged violation of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188

(1938), is perplexingly diffuse. Semtek seems to ignore the fact that the present appeal to this Court is from the decision of Judge Joseph H.H. Kaplan in the Circuit Court for Baltimore City and not from the decision of Judge Audrey B. Collins in the United States District Court for the Central District of California.

The *Erie* Doctrine applies, of course, to federal courts and not to state courts. As it, in 1938, overruled the century-old precedent of *Swift v. Tyson*, 41 U.S. 1, 16 Peters 1, 10 L. Ed. 865 (1842), *Erie* held that in cases initiated in or removed to federal district courts on the basis of diversity of citizenship, the federal court should apply the substantive law of the state wherein the justiciable event took place. The justiciable event in this case took place in the State of California, and Semtek's suit against Lockheed was originally filed in a California state court. When the suit was subsequently removed to the United States District Court for the Central District of California, that court was, by the *Erie* Doctrine, enjoined to apply the substantive law of the State of California, including the applicable California statute of limitations. We have every reason to believe that the federal district court correctly applied the substantive state law of California.

Semtek's argument to the contrary seems to run as follows: 1) California, like Minnesota in the *Reinke v. Boden* case, treats its statute of limitations as only procedural in nature; 2) California, therefore, treats its dismissals of actions as time-barred as not having any preclusive effect on similar suits filed in other jurisdictions; **[1120]** 3) California considers its *res judicata* or preclusion law as part of its substantive law; and 4) the federal district court, in this diversity case, should have treated its judgment of dismissal as similarly non-preclusive. When Judge Collins ordered, therefore, that the dismissal on limitations grounds be "on the merits and with prejudice," instead of making it clear that the dismissal had no such preclusive effect, she thereby violated the *Erie* Doctrine.

As we shall discuss *infra*, we do not believe that to have been the case. Even if it were, however, Semtek's appeal to this Court is totally inappropriate. If the federal district court judgment was in any way in error, Semtek's remedies were 1) post-trial motions to the federal district court itself, 2) an appeal to the United States District Court for the Ninth District, and 3) a petition for *certiorari* to the Supreme Court of the United States. It is not the job of an intermediate appellate court in Maryland, just as it was not the job of Judge Kaplan in the Circuit Court for Baltimore City, to reverse, to overrule, to modify, to alter, to amend, or to reform the judgment of the United States District Court for the Central District of California. It is, rather, appropriate for us to extend full faith and credit to that judgment, not as Semtek thinks it should be reformulated but as it was unambiguously expressed. *Osteoimplant Technology v. Rathe*, 107 Md. App. 114, 117-18, 666 A.2d 1310 (1995) ("We hold . . . that the judgment is only subject to reopening in the court which rendered the initial judgment. Hence, if appellant wishes to have the judgment vacated, altered, or amended, those issues must be addressed by the United States District Court for the Southern District of New York.").

That being said, however, we further believe that, in the United States District Court, Judge Collins correctly applied the substantive law of the State of California. What Semtek argues is the preclusion law or the *res judicata* law of the State of California is, when looked at precisely, the law as to how California characterizes judgments of dismissal on limitations grounds **RENDERED BY CALIFORNIA STATE COURTS**. There was in this case no judgment of dismissal by a California state court and the California state preclusion law with respect to such a state court judgment, therefore, is utterly immaterial. In *Costantini v. Trans World Airlines*, 681 F.2d 1199 (1982), the Ninth Circuit applied the *res judicata* law of the State of California with respect to a judgment earlier rendered not by a California state court but by a federal district

court sitting, in diversity, in the State of California. The federal district court had dismissed the diversity claim as one barred by *res judicata*. As urged by the plaintiff, the Ninth Circuit agreed "that a federal court sitting in diversity must apply the *res judicata* law of the state in which it sits." 681 F.2d at 1201. It then pointed out, however, that California law, in turn, determines the preclusive effect of a prior federal judgment by looking to federal, not California, preclusion standards. The holding of the Ninth Circuit was clear:

> California's law of *res judicata* dictates what preclusive effect is to be accorded to the prior judgment against appellant. That *California law, however, determines the res judicata effect of a prior federal court judgment by applying federal standards.* Therefore, those federal standards are applicable here to determine the preclusive effect of the prior judgment.

Id. (footnote omitted; emphasis supplied). *See also Bates v. Union Oil Co.*, 944 F.2d 647, 649 (1991), *cert. denied*, 503 U.S. 1005 (1992). Judge Kaplan expressly relied on the Ninth Circuit's decision in *Costantini v. Trans World Airlines* as an alternative ground for his ruling that Semtek's suit was barred by *res judicata*:

> Even if the Court were to ignore the language of Rule 41(b) and accept Plaintiff's arguments distinguishing the [1121] Fourth and Fifth Circuit cases from the present one, the Ninth Circuit has also applied federal law in establishing the preclusive effect of federal judgments on subsequent identical state court actions. For example, the Ninth Circuit in *Costantini v. Trans World Airlines*, 681 F.2d 1199 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982) explained that *[the] California state court would rely on federal law to determine*

the preclusive effect of a federal judgment.

(Emphasis supplied). Two decisions of the Supreme Court of California have also indicated that California will follow federal preclusion law in determining the *res judicata* effect of an earlier federal judgment on a subsequent suit in a California state court. *Younger v. Jensen*, 26 Cal.3d 397, 411, 161 Cal. Rptr. 905, 914, 605 P.2d 813, 822 (1980); *Levy v. Cohen*, 19 Cal.3d 165, 172-73, 137 Cal. Rptr. 162, 167, 561 P.2d 252, 257 (1977).

Conclusion

We affirm the ruling of Judge Kaplan that Semtek's refiling of the suit against Lockheed was barred on the ground of *res judicata*. The earlier dismissal of the suit by the United States District Court for the Central District of California was a judgment on the merits and was entitled to the preclusive effect that Judge Kaplan gave it.

JUDGMENT AFFIRMED;
COSTS TO BE PAID
BY APPELLANT.

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 495
September Term, 1999

(No. 1041, Sept. Term, 1998
Court of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: **DEC 21 1999**

APPENDIX C

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

SEMTEK INTERNATIONAL, INC.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	CASE NO.
	*	
LOCKHEED MARTIN CORP., et al.,	*	97183023
	*	
Defendants.	*	
	*	

* * * * * * * * * * * * * * * * *

MEMORANDUM OPINION

Pending before this Court is Defendant's, Lockheed Martin Corporation's Motion to Dismiss.

I. *BACKGROUND*

Plaintiff, Semtek International Incorporated (hereinafter "Semtek"), originally filed this action on February 26, 1997 in the Los Angeles Superior Court for California. Semtek based its complaint on four separate causes of action: (1) inducing breach of contract with Merkuriy, a Russian satellite communications company; (2) intentional interference with economic advantage with Merkuriy; (3) negligent interference with economic advantage with Merkuriy; and (4) conspiracy to interference with economic advantage with Merkuriy.

On March 11, 1997, Lockheed Martin Corporation (hereinafter "Lockheed") removed the California case to the United States District Court for the Central District of California based on federal diversity jurisdiction under 28 U.S.C. §1332 and 1441(b). The District Court for the Central District of California granted Lockheed's motion to dismiss with prejudice based on California's two year statute of limitations period. Semtek has subsequently appealed that decision to the Ninth Circuit.

During the pendency of the California action, additional investigation by Semtek revealed that much of the alleged tortious conduct occurred in Maryland where the statute of limitations in these causes of action is three years. Accordingly, in July 1997, Semtek filed for relief in the Circuit Court for Baltimore City seeking the same remedy sought previously in the California action. Lockheed removed the case to the United States District Court for the District of Maryland and simultaneously filed a motion to transfer or stay the case.

At the same time, Lockheed also filed for injunctive relief seeking to prevent Semtek from proceeding in Maryland based on theory of *res judicata* due to Judge Audrey Collins' (Central District of California) prior ruling dismissing that action. Judge Collins denied [Lockheed's] request for injunctive relief and after receiving that decision Lockheed withdrew its motion to transfer.

Semtek also filed a motion to remand and Lockheed filed a motion to dismiss in the United States District Court for the District of Maryland. There, the District Court granted Semtek's motion to remand but failed to address Lockheed's motion to dismiss. The case is now before this Court to determine whether the California District Court decision should be given *res judicata* effect.

II. *LEGAL STANDARD*

A complaint is subject to dismissal for failure to state a claim upon which relief can be granted where it appears beyond a doubt that the Plaintiff can prove no facts that would entitle it to the relief sought. See, e.g., *Levy v. E. Stewart Mitchell, Inc.*, 585 F. Supp. 1030 (D. Md. 1984); *Rosengarten v. Buckley*, 565 Supp. 193 (D.Md. 1983); *Hall v. Board of County Commissioners of Frederick County*, 509 F. Supp. 841 (D.Md. 1981). For the purposes of this motions to dismiss, this Court must "assume the truth of all relevant and material facts that are well pleaded and all inferences which can be reasonably drawn from the pleadings." *Sharrow v. State Farm Mut. Auto. Ins. Co.*, 306 Md. 754, 768 (1986). Dismissal is appropriate if, assuming the truth of the facts and allegations, those facts fail to afford plaintiff relief. *Faya v. Almaraz*, 329 Md. 435, 443 (1993).

III. *INTRODUCTION*

The central issue that this court has been asked to consider is the preclusive effect of a federal dismissal on a subsequent identical state court action. To accomplish this analysis, the Court must determine whether to apply federal or state law. Pursuant to the clear language of the Federal Rules of Civil Procedure and federal preclusive law, federal law determines the preclusive effect of a prior federal judgment.

IV. *DISCUSSION*

A. FEDERAL RULE OF CIVIL PROCEDURE, 41(B) IS THE CONTROLLING FEDERAL LAW.

In *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 493, 525 A.2d 232, 235 (1987) (quoting Restatement (Second) of Judgments § 87), the Court of Appeals [of] Maryland stated

that "federal law determines the effects under the rules [of] *res judicata* of a judgment of a federal court." Accordingly, because Semtek does not deny that the United States District Court for the Central District of California dismissed every claim contained in Semtek's current Maryland complaint with prejudice on statute of limitations grounds, federal law must be employed to determine the preclusive effect of this prior federal court judgment.

The applicable federal law is Federal Rule of Civil Procedure 41(b). It provides in pertinent part that: " unless the Court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." The plain language of the rule requires that the dismissal of the Plaintiff's California action be deemed an adjudication on the merits and warrants dismissal of Semtek's duplicative Maryland complaint with prejudice.

Semtek argues that Rule 41(b) should not be applied because the United States District Court for the Central District of California's Order denying Lockheed's request for a Permanent Injunction states that the Court had not reached the "substantive merits" of Semtek's claims.

Plaintiff's argument is flawed for several reasons. First and foremost, neither party stated an objection to the Order signed by Judge Collins dismissing the United States District Court Central District of California action, in its entirety on the merits and with prejudice. This Order states that, "IT IS ORDERED, ADJUDGED AND DECREED, that plaintiff Semtek International Incorporated take nothing on its complaint in this action, that the action can be dismissed in its entirety on the merits and with prejudice, and that the Judgment be entered forthwith in favor of defendants . . . ." Secondly, Judge Collins explicitly stated in footnote 13 of her opinion that . . . "the Court must reiterate that these issues are properly decided by

the proper court in Maryland, and any dicta or any other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of . . . *res judicata* preclusion." Furthermore, the District Court expressly requested theat the parties not cite any dicta contained in that order.

B. FEDERAL PRECLUSION PRINCIPLES BAR SEMTEK'S ATTEMPT TO RELITIGATE IN MARYLAND STATE COURT CLAIMS PREVIOUSLY DISMISSED WITH PREJUDICE IN THE CENTRAL DISTRICT OF CALIFORNIA.

Even if this Court was not convinced by *Kent County Bd. of Educ.*, Fourth and Fifth Circuit case authority serve to strengthen the Court's convictions that federal preclusion principles should be applied to determine the *res judicata* effect of the Central District of California's dismissal of all of Semtek's claims on statute of limitations grounds. While this Court recognizes that Fourth Circuit and Fifth Circuit cases are not binding on Maryland State Courts, *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989) and *Steven D. Thompson Trucking Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, *reh'g denied, en banc*, 880 F.2d 818 (5th Cir. 1989) (hereinafter "Thompson Trucking") provide sufficient persuasive authority on the proper application of federal preclusion principles governing the resolution of this Motion.

Defendant relies on *Shoup* to support their proposition that the action should be dismissed and the Court agrees. In *Shoup*, Plaintiffs filed their original lawsuit in Pennsylvania state court alleging only state law personal injury claims. *Id.* at 1178. Defendant removed the case to federal court on diversity of citizenship grounds. Applying Pennsylvania's statute of limitations to the Plaintiff's claims, the District Court dismissed the action as time barred.

Due to the dismissal, the *Shoup* Plaintiffs refiled the exact same lawsuit in state and federal courts in Maryland in an effort

to avail themselves of Maryland's longer statute of limitations. *Id.*at 1178. As a result, the *Shoup* Defendant removed the state court action to federal court on the basis of diversity of citizenship and motioned to have the case dismissed because of *res judicata. Id.* The *Shoup* Plaintiffs argued that because the original federal action only involved state law claims and diversity of citizenship was the sole justification for federal jurisdiction, Maryland law controlled. In addition, Plaintiffs stated that because Maryland law holds that a dismissal as result of statute of limitations is procedural in nature, the Pennsylvania judgment did not represent a final judgment and therefore was not entitled to any *res judicata* effect. Thus, because the case was filed within Maryland's statute of limitations, Plaintiffs asserted that their claims should be permitted to proceed.

In determining the *res judicata* effect of the prior federal judgment, the Fourth Circuit relied on federal law. "Questions about the effect and scope of a federal court judgment involve the power of the federal tribunal itself, and are not varied merely because state rules of decision underlie the judgment" *Id.* at 1179. The Court further stated that Rule 41(b) prescribes that federal judgments based on statute of limitations are final judgments on the merits. *Id.* at 1179-80. The Court explained in pertinent part that:

> "Federal law . . . does not permit a plaintiff to shop indefinitely for favorable statute of limitations in every state where personal jurisdiction over a Defendant might be found. We need not ponder the factors that may have led Plaintiff to file first in a Pennsylvania forum, for we are not at liberty to vary the principles of preclusion to accommodate them. The doctrine of *res judicata* "is not a mere matter of practice or procedure inherited from a more technical time

> than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts . . ."

872 F.2d at 1182 (quoting *Federated Dep't. Stores v. Moitie*, 452 U.S. 394, 401 (1981)).

In further support of its proposition Defendant relies on *Stephen D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044 *reh'g denied, en banc*, 880 F.2d 818 (5th Cir. 1989) (hereinafter "Thompson Trucking"). In *Thompson Trucking*, the Fifth Circuit relying on *Shoup* held that the Federal Court's dismissal with prejudice based on the Louisiana state statute of limitations was a "final judgment on the merits" pursuant to Rule 41(b) barring relitigation of the same claims in a Mississippi state court under Mississippi's longer statute of limitations. *Thompson Trucking*, 870 F.2d at 1046. In making its decision, the Court explained that policy reasons behind its decision.

> "Multiple litigation is costly, both in terms of expense incurred by a party who must defend against the same claim in different courts . . . [a]llowing plaintiffs who fail to comply with applicable statute of limitations to move to next state over would have the undesirable effect of encouraging forum shopping and rewarding dilatory conduct.
>
> In that regard, if *res judicata* were unavailable in the instant case, the defendants having once engaged counsel in Louisiana, would be faced with the prospect of again hiring counsel in Mississippi to defend the same action one more time . . . If [plaintiff] had elected to do so, he could have filed suit in Mississippi to begin with and thereby availed

> himself of the state's longer period of prescription. [Plaintiff] chose, however, to file first in Louisiana and accordingly he was responsible for compliance with the state's prescriptive period."

870 F.2d at 1046.

Semtek attempts to distinguish the present action from *Thompson Trucking* and *Shoup*. Similar to Plaintiffs in *Thompson Trucking*, Semtek asserts that it chose to file its suit originally in California and only came to Maryland after the initial suit was dismissed with prejudice. In addition Plaintiff argues that because *Shoup* is a federal case, it has no binding effect in this action. Relying on the language utilized in the Shoup opinion, Semtek argues that *Shoup* is applicable only where the second case is filed in a federal forum, which they did not do.

> "In this case we must determine if a dismissal by one federal court on statute of limitations grounds bars subsequent litigation of the same claim between the same parties in a second federal forum. The district court held it does not. We reverse and hold that pursuant to Fed. R. Civ. P. 41(b) the earlier statute of limitations ruling is a judgment on the merits subject to claim preclusion."

872 F.2d at 1178.

In both *Shoup* and *Thompson Trucking*, Plaintiffs filed their second action directly in the Federal District Court. Plaintiffs availed themselves voluntarily to the Federal Rules of Civil Procedure after another Federal court dismissed their case. Plaintiffs elected to refile their actions in Federal court and thus imposed the very burden that Rule 41(b) seeks to prevent: forum shopping. Accordingly, the Courts in those

cases applied the doctrine [of] *res judicata* under Rule 41(b) and dismissed the cases.

In the present case, Semtek filed the second action in Maryland state court, not federal court, and Lockheed subsequently removed it. Semtek never sought relief on its own initiative from the Federal System. In both Maryland and California actions, Lockheed removed the cases to Federal Court. In fact the United States District Court in its remand order stated that "Semtek . . . has never alleged anything remotely resembling a federal claim, for both its Maryland and California complaints alleged only state law business torts." Remand Order. Judge Collins addressed this same point in her ruling on Lockheed's attempt to enjoin Semtek's pursuit of the Maryland action.

> ". . . in both *Shoup* and *Thompson Trucking*, the respective Plaintiffs had statutory time bar judgments entered against them in one federal district court, and attempted to relitigate the claims in a second federal court. In order to prevent forum-shopping among the various federal districts, both the Fourth and Fifth Circuits held that Plaintiff's subsequent actions were barred.
>
> In the instant case, however, unlike the Plaintiffs in *Shoup* and *Thompson Trucking*, [Plaintiff] has not purposefully availed itself of a second federal forum. Plaintiff filed both first and second actions in state courts — California and Maryland, respectively. Assuming that the Maryland case is remanded to Maryland state court, the *Shoup* and *Thompson Trucking* holdings would not apply. In the Court's opinion, both holdings were animated primarily by an interest in preventing forum shopping among the federal district courts, which is an unnecessary and wasteful burden upon the federal court system." *See Thompson Trucking*, 870 F.2d at 1046.

Plaintiff argues that the case authority upon which Lockheed relies is inapplicable both because of Judge Collins' opinion as discussed above and also because rule 41(b) does not govern actions in Maryland State Court. Therefore, Plaintiff argues that this Court should not penalize Semtek with a dismissal for federal forum shopping when Lockheed was the only party shopping for the federal forum.

The Court does not deny the existence of these distinctions. However, these distinctions are without difference. The Fourth Circuit's holding in *Shoup* illustrates that the uniform application of federal preclusion law to prior federal judgments is a prerequisite to preserving the integrity of the federal system. For the purpose of this analysis, it is irrelevant whether Plaintiff decided to file the second action in state or federal court. Furthermore as previously discussed, Judge Collins explicitly stated in footnote 13 of her opinion that . . . "the Court must reiterate that these issues are properly decided by the proper court in Maryland, and any dicta or any other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of . . . *res judicata* preclusion." In addition, the [sic] Judge Collins expressly requested that the parties not cite any dicta contained in that order.

This point is further illustrated by *Andes v. Padden, Welch, Martin & Albano*, 897 S.W.2d 19 (Mo. 1995). In *Andes*, the Missouri Court of Appeals upheld the dismissal of a state court tort action. The Court determined that the action was barred due to the *res judicata* effect of a prior federal judgment in which the action was dismissed on limitations grounds. The Court explained that, "*res judicata* is based on the principle that a party should not be allowed to litigate a claim and then after an adverse judgment, seek to relitigate the identical claim

in a second proceeding." *State ex rel. Shea v. Bossola*, 827 S.W.2d 722, 723 (Mo. App. 1992). If Plaintiff failed to comply with Maryland's statute of limitations and this Court dismissed the case on the [sic] those grounds, nothing would prevent Semtek from filing this action in another jurisdiction with a longer statute of limitations. This is the particular type of forum shopping that the Court seeks to prevent.

Even if the Court were to ignore the language of Rule 41(b) and accept Plaintiff's arguments distinguishing the Fourth and Fifth Circuit cases from the present one, the Ninth Circuit has also applied federal law in establishing the preclusive effect of federal judgments on subsequent identical state court actions. For example, the Ninth Circuit in *Constantini v. Trans World Airline*, 681 F.2d 1199 (9th Cir.), cert denied, 459 U.S. 1087 (1982) explained that California state court would rely on federal law to determine the preclusive effect of a federal judgment. It stated in pertinent part that:

> "This court has held that a federal court siting in diversity must apply the *res judicata* law of the state in which it sits. We have applied that rule even where the prior action was in federal court and involved federal questions . . . Hence, California's law of *res judicata* dictates what preclusive effect is to be accorded to the prior judgment against the appellant. That California law, however, determines the *res judicata* effect of a prior federal court judgment by applying federal standards. Therefore those federal standards are applicable here to determine the preclusive effect of the prior judgment."

Id. at 1201; *In Re Silva*, 190 B.R. 889, 892 n.1 (9th Cir. BAR 1995).

III. *CONCLUSION*

The Court is convinced that Federal Rule of Civil Procedure 41(b), Fourth, Fifth, Ninth Circuit case law and the *Andes* holdings mandate this Court to find the judgment of the District Court for the Central District for the Central District of California, dismissing Semtek's claims on statute of limitations grounds, a final judgment on the merits, and therefore prohibit Semtek from relitigating these claims in Maryland due to *res judicata*. Federal law does not permit Plaintiff to shop indefinitely for a forum that will give credence to their arguments. Plaintiff had its day in Court for this action and apparently was not satisfied with Judge Collins' decision. Semtek could have originally filed this suit in Maryland state court, but instead filed this action in California. Thus, Semtek should be bound by California's two-year statute of limitations and Judge Collins' decision dismissing the action. Lockheed should not be forced to follow Plaintiff from state to state to defend an action previously decided in another jurisdiction. Accordingly, the Court agrees with Lockheed in that the fairest and most efficient use of federal and state judicial resources mandates that this Court grant Lockheed's Motion to Dismiss Semtek's Maryland Complaint with prejudice.

/signed/
Joseph H. H. Kaplan
Administrative Judge

Date: April 30, 1998

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Semtek International, Inc.,	CASE NO.: CV 97-1580 ABC (RNBx)
Plaintiff,	**Order Re: Defendants' Motions to Dismiss**
vs.	
Lockheed Martin Corp., et al.,	
Defendants.	

Defendants' Motions to Dismiss came on regularly for hearing before this Court on May 5, 1997. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that Defendants' Motions are GRANTED.

I. Procedural Background

On February 26, 1997, Plaintiff SEMTEK INTERNATIONAL, INC. ("Plaintiff" or "Semtek") filed a Complaint in the Superior Court of the State of California for the County of Los Angeles against Defendants LOCKHEED MARTIN CORPORATION ("Lockheed"), SAMUEL URSINI ("Ursini"), and DOES 1 through 100. In the Complaint, Plaintiff alleged four separate causes of action for: (1) inducing breach of contract; (2) intentional interference with economic advantage; (3) negligent interference with economic advantage; and (4) conspiracy to interfere with prospective economic advantage.

On March 11, 1997, Lockheed properly removed Plaintiff's action to this Court based on federal diversity jurisdiction under

28 U.S.C. §§ 1332 and 1441(b). On March 18, 1997, Lockheed filed its Motion to Dismiss for failure to state a claim. On April 8, 1997, Ursini filed a Motion to Dismiss that was virtually identical to Lockheed's Motion.[1] On April 12, 1997, Plaintiff filed separate, but essentially identical, Oppositions to Lockheed and Ursini's Motions. Lockheed and Ursini filed a joint Reply on April 28, 1997.

II. Plaintiff's Allegations

This case arises from competition amongst three American corporations to solicit and solidify a "joint venture" business relationship with a Russian corporation for the operation and marketing of satellite communication systems. Plaintiff alleges that this competition resulted in tortious conduct, which damaged Plaintiff's contractual rights and prospective economic advantage. Plaintiff's specific allegations are summarized below.

Plaintiff SEMTEK INTERNATIONAL INCORPORATED was formed in 1992 for the purpose of engaging in commercial relationships with emerging Russian private enterprises. [Compl. ¶ 6]. In late October, 1992, several officers of Semtek traveled to Russia to meet with the executive director of MERKURIY, LTD. ("Merkuriy"). [Id.]. Merkuriy had been licensed by the Russian Space Agency to make certain satellites available for commercial use, including the rental of international communications channels for the transmission of voice, video, or data signals. The October 1992 meetings led to the execution on November 5, 1992 of a document entitled "Business Agreement" whereby Semtek and Merkuriy agreed to discuss the creation of a joint venture to develop and use satellite telecommunications systems in which Merkuriy would provide development and launch capability and Semtek would

[1] Defendants Lockheed and Ursini are represented by the same counsel in this action.

provide financing and marketing. [Compl. ¶ 7].

In December 1992, officers of Semtek again traveled to Russia to meet with Merkuriy representatives. [Compl. ¶ 8]. On or about December 19, 1992, Semtek and Merkuriy entered into a written agreement entitled "Protocol," to form a joint venture for the operation and marketing of satellite communications services utilizing the Luch I Satellite configuration. [Id.]. On May 2, 1993, Semtek and Merkuriy executed a further agreement entitled "Letter of Intent to Establish a Joint Venture Company Between Merkuriy, Ltd. and Semtek International Incorporated." [Compl. ¶ 11].

After entering into the "Protocol" and "Letter of Intent" with Merkuriy, Semtek commissioned marketing studies and began to arrange financing for the joint venture. [Compl. ¶¶ 10, 12]. Merkuriy, on the other hand, did not complete many of its preparatory tasks. [Compl. ¶ 15]. On February 2, 1994, Merkuriy wrote to Semtek confirming Merkuriy's intention regarding the founding of a joint venture with Semtek, but extending the time for entering into a formal joint venture agreement until December 31, 1994. [Compl. ¶16].

In May 1994, Merkuriy informed Semtek that MARTIN MARIETTA TECHNOLOGIES, INC. ("Martin Marietta")[2] had expressed an interest in the Luch I Satellite project. [Compl. ¶ 17]. Merkuriy represented that Martin Marietta would supply technical assistance to the project, but confirmed that the Semtek/Merkuriy joint venture was still on course. [Id.].

On July 5, 1994, Merkuriy notified Semtek that the Semtek/Merkuriy joint venture might be in jeopardy due to the involvement of Martin Marietta and a third party. [Compl. ¶ 20]. This was the first indication from Merkuriy that it might breach its agreements with Semtek. [Id.]. On July 6, 1994, Semtek wrote to the Chairman of Martin Marietta formally

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[2] Plaintiff alleges that Martin Marietta Technologies, Inc. is a predecessor in interest to Defendant Lockheed Martin Corporation.

notifying Martin Marietta of the Semtek/Merkuriy joint venture and the fact that any agreement between Martin Marietta and Merkuriy for commercialization of the Luch I Satellite would conflict with Semtek/Merkuriy joint venture.

On or about July 12, 1994, officers of Semtek met with Ursini (of Martin Marietta) and the President of TRANSWORLD COMMUNICATIONS ("Transworld"). [Compl. ¶ 22]. At that meeting, Transworld stated that Semtek had no joint venture with Merkuriy, that Transworld had a contract with Merkuriy for Luch I Satellite development, and that Martin Marietta was merely engaged in a contractual arrangement with Transworld. [Id.]. Ursini agreed with and endorsed Transworld's position in all respects. [Id.].

On August 1, 1994, Semtek wrote to Ursini notifying him that as the party financing Transworld's venture with Merkuriy for commercialization of the Luch I Satellite, and as the party primarily benefiting from that venture financially, Martin Marietta was interfering with Semtek's ongoing relationship with Merkkuriy. [Compl. ¶ 25].

On August 8, 1994, Merkuriy declared to Semtek that the Letter of Intent was not binding, that the joint venture had to be established by July 4, 1993, and that the joint venture was not formed due to the efforts of Transworld.[3] [Compl. ¶ 26]. Plaintiff alleges that Merkuriy wrote this letter as a direct result of the acts of interference by Transworld and Martin Marietta,

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[3] In a related case, *Semtek International Incorporated v. Merkuriy Ltd. And Pyotr Sivirin*, Case No. 95-CV-11820 (RCL), filed in the United States District Court for the District of Massachusetts, Semtek declared under penalty of perjury that this August 8, 1994 facsimile from Merkuriy constituted a "unilateral breach of contract between Semtek and Merkuriy and an anticipatory breach of future obligation by Merkuriy . . . ." Affidavit of James L. Newkirk, dated April 5, 1996. The Court takes judicial notice of the Newkirk Affidavit pursuant to Fed. R. Evid. 201. The Court may consider "matters of public record outside the pleadings" in the determination of a Rule 12(b)(6) motion to dismiss. *Mir v. Little Co. of Mary Hospital*, 844 F.2d 646, 649 (9th Cir. 1986).

which caused Merkuiry to disregard the extension given for completion of the joint venture by December 31, 1994. [Id.].

Finally, Plaintiff alleges that, commencing in July 1994 and continuing to the present time, with full knowledge of the agreements and relationship between Semtek and Merkuriy, Martin Marietta and Transworld entered in to and engaged in efforts to secure for themselves a contract with Merkiury for the commercial exploitation of the Luch I Satellite, all in conflict with and in derogation of the known rights of Semtek and the known relationship of Semtek and Merkuriy. [Compl. ¶ 24]. Those efforts culminated in Martin Marietta and Transworld securing a contract with Merkuriy at a later date whereby Martin Marietta and Transworld would provide the financing and marketing for the satellite, and Merkuriy would provide the engineering, technology, and hardware. [Id.]. Martin Marietta and Transworld thereby took over the position and responsibilities of Plaintiff in its relationship with Merkuriy. [Id.]. Plaintiff's claims for inducing breach of contract; intentional interference with economic advantage; negligent interference with economic advantage; and conspiracy to interfere based on the facts stated above.

III. Discussion

A. Motion to Dismiss for Failure to State a Claim

1. Standard

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1356 (1990). A Rule 12 (b)(6) dismissal is proper only where there is either a "lack of cognizable legal theory" or the "absence of sufficient facts

alleged under a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

A court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *see also Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980) (finding that the complaint must be read in the light most favorable to the plaintiff). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations case in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981); *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969).

Furthermore, unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). *Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991), *overruled on other grounds* by *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., et al.*, ___ U.S. ___, 114 S. Ct. 1439 (1994). A court may, however, consider exhibits submitted with the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986), *abrogated on other grounds by Astoria Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104 (1991).

Lastly, a Rule 12(b)(6) motion " will not be granted merely because [a] plaintiff requests a remedy to which he or she is not entitled." Schwarzer, et al., *Civil Procedure Before Trial* § 9:230. "It need not appear that plaintiff can obtain the *specific* relief demanded as long as the court can ascertain from the face

of the complaint that *some* relief can be granted." *Doe v. United States Dept. of Justice.*, 753 F.2d 1092, 1104 (D.C. Cir. 1985); *see also Doss v. South Central Bell Telephone Co.*, 834 F.2d 421, 425 (5th Cir. 1987) (demand for improper remedy not fatal if claim shows plaintiff entitled to different form of relief).

2. Analysis

The Motions to Dismiss brought by Defendants Lockheed and Ursini are essentially identical in form and substance. Accordingly, they will be considered together in the Court's analysis. Defendants' main argument is that Plaintiff's Complaint must be dismissed because each claim i[s] barred by the applicable statute of limitations. For reasons discussed below, the Court agrees.

Plaintiff alleges four separate causes of action for: (1) inducing breach of contract; (2) intentional interference with economic advantage; (3) negligent interference with economic advantage; and (4) conspiracy to interfere with prospective economic advantage.[4] California courts have held that the two-year statute of limitation specified by Cal. Civ. Proc. Code § 339(1) applies to such torts. *See e.g. Trembath v. Dicardi*, 43 Cal. App. 3d 834, 836 (1974) (two-year statute of limitations for inducing breach of contract); *Kenworthy v. Brown*, 248 Cal. App. 2d 298, 301 (1967) (two-year statute for inducing breach

[4] For purposes of the Court's statute of limitations analysis, Plaintiff's fourth claim for "civil conspiracy" is not directly considered. In California, there is no separate cause of action for "civil conspiracy." Plaintiff acknowledges this fact. [*See* Opposition at p. 8]. When a plaintiff has alleged a non-recognized action for "civil conspiracy" to commit a tort, the applicable statute of limitations is governed by the underlying tort without regard to allegations of conspiracy. *See, e.g., Agnew v. Parks*, 172 Cal. App. 2d 756, 765 (1959) ("There exist[s] no cause of action for conspiracy in and of itself, [therefore,] the statute of limitations is determined by the nature of the action in which the conspiracy is alleged.").

of contract); *McFaddin v. H.S. Crocker Co.*, 219 Cal. App. 2d 585, 591 (1963), *superseded by statute on other grounds as stated in, Levine v. Pollack*, 37 Cal. App. 4th 129 (1995) (two-year statute of limitations for interference with business); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677 (9th Cir. 1980) ("A cause of action for tortious interference with business relationships is governed by the two year statute of limitations.").

Defendants argue that Plaintiff's causes of action accrued more than two years before Plaintiff filed its Complaint. The Court agrees. In general, a cause of action for intentional interference with contract or prospective economic advantage accrues from the date of the wrongful act. *See Engstrom v. Kallins*, 49 Cal. App. 773, 783 (1996) ("a cause of action accrues when, under the substantive law, the wrongful act is done and liability arises . . . ."). In an action for inducement to breach a contract, the accrual date cannot "be later than the actual breach of the contract by the party who was wrongfully induced to breach." *Trambath*, 43 Cal. App. 3d at 836; *see also San Francisco Unified School Dist. v. W.R. Grace & Co.*, 37 Cal. App. 4th 1318, 1326 (1995) ("once plaintiff has suffered actual and appreciable harm, neither the speculative nor the uncertain character of damages nor the difficulty of proof will toll the period of limitation").

In cases where the Complaint reveals on its face that claims are barred by the applicable statute of limitations, dismissal of those claims is proper under Rule 12(b)(6). *See Conerly v. Westinghouse Elec. Corp.*, 623 F.2d 117, 119 (9th Cir. 1980); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). In this case, the Complaint reveals that, as early as July 5, 1994, Plaintiff was notified that its prospective joint venture with Merkuriy could be in jeopardy due to the involvement of Martin Marietta and Transworld. [Compl. ¶ 20]. Further, the Complaint reveals that, in July 1994, Plaintiff was also aware of Martin Marietta's (and, therefore, Ursini's) potential liability for interference with Plaintiff's prospective business

relationship with Merkuriy. [Compl. ¶ ¶ 21, 25]. Finally, Plaintiff declared, under the penalty of perjury, that its agreement with Merkuriy was breached on August 8, 1994. [See Exh. A. to Lockheed's Request for Judicial Notice, Newkirk Aff., ¶4]. Under the rule in *Trembath, supra*, Plaintiff's causes of action could not have accrued any later than August 8, 1994, the date of the admitted breach, which is addressed in Plaintiff's first claim. Plaintiff's remaining claims similarly could not have accrued at a later date. The alleged wrongful conduct inducing breach of the alleged Semtek/Mer[k]uriy business relationship must have occurred on or before the date that Merkuriy breached its contract which, according to Plaintiff's affidavit, occurred on August 8, 1994.

Plaintiff filed this action on February 26, 1997, over two-and-a half years after the action accrued. Therefore, unless the action was somehow tolled, it is barred by the two-year statute of limitations.

Plaintiff alleges that the two-year limitations period on its causes of action was tolled by Defendants' "fraudulent concealment" of the claim. [Compl. ¶32]. In order to successfully toll the applicable limitations period, Plaintiff must plead "facts showing that [Defendants] actively misled him [and] that he had neither actual nor constructive knowledge of the facts constituting his claim for relief." *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978). Also, Plaintiff "must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief." *Id.* at 250. Further, under Fed. R. Civ. P. 9(b), Plaintiff's allegations of fraud must be pled with particularity.[5]

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[5] Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." When the requirements of Rule 9(b) are not met, dismissal under Fed. R. Civ. P 12(b)(6) is appropriate. *See Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1986) (failure to meet Rule 9(b) standards makes dismissal under Rule 12(b)(6) proper); *see also Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985) (court may dismiss a claim for failure to comply with Rule 9(b) under Rule 12 (b)(6).

Under all of the standards noted above, Plaintiff's Complaint fails to state a viable basis for tolling of the statute. Specifically, Plaintiff's allegations of fraudulent concealment are contradicted and belied by other allegations in the Complaint. The allegations in Paragraphs 21 and 25 clearly establish that Plaintiff was aware of Defendants' potential liability, and had knowledge of facts sufficient to constitute claims for relief. A vague claim of fraudulent concealment cannot contradict these factual allegations, which are supported by documentary exhibits. Further, Plaintiff's allegations of fraud and misrepresentation are not pled with particularity.[6]

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[6] The Ninth Circuit has emphasized the need under Rule 9(b) to plead fraud with particularity. In the absence of particularized allegations, a defendant is unable to respond to the charges of fraud. It is precisely this dilemma that Rule 9(b) is intended to remedy. *See Semegen v. Weidner*, 780 F.2d at 731 ("Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.").

In order to adequately plead fraud, a plaintiff must "state the time, place and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Miscellaneous Service Workers v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981); *accord Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).

Most, if not all of the cases above, were decided under circumstances where fraud was alleged as a separate cause of action in the Complaint. Rule 9(b), however, is not limited to cases where fraud is the independent cause of action. Rather, Rule 9(b) is implicated in "all averments of fraud. . . ." Fed. R. Civ. P. 9(b). Under the Rule 9(b) standard articulated above, Plaintiff has failed to adequately plead facts supporting a tolling of the statute of fraudulent concealment. Further, for reasons noted above, Plaintiff cannot amend the fraudulent concealment allegations because they are contradicted and belied by the documented allegations at Paragraph 21 and 25 of the Complaint.

According to the allegations of Plaintiff's Complaint, the two-year statute of limitations could not have been tolled by fraudulent concealment. The applicable statute of limitations bars this action in its entirety. Accordingly, Defendants' Motions to Dismiss must be DISMISSED WITH PREJUDICE because, given the allegations in the Complaint, amendment would be futile (Plaintiff cannot plead around or contradict its current allegations).

IV. Conclusion

For all these reasons, the Court hereby ORDERS that Defendants' Motions to Dismiss Plaintiff's Complaint are GRANTED. This matter is hereby DISMISSED WITH PREJUDICE.

SO ORDERED.

DATED: May 5, 1997

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Semtek International, Inc.,	)	CASE NO.: CV 97-1580
	)	ABC (RNBx)
Plaintiff,	)	
	)	**JUDGMENT**
vs.	)	
	)	
Lockheed Martin Corp., et al.,	)	
	)	
Defendants.	)	

This action came on for hearing before the Court, Honorable Audrey B. Collins, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff Semtek International Incorporated take nothing on its complaint in this action, that the action be dismissed in its entirety on the merits and with prejudice, and that this Judgment be entered forthwith in favor of defendants Lockheed Martin and Samuel Ursini.

DATED: 5/8/97

/s/ Audrey B. Collins
The Honorable Audrey B. Collins
United States District Judge

SUBMITTED BY:

ROBERT E. WILLETT
RICHARD W. BUCKNER
SANDRA R. KLEIN
O'MELVENY & MYERS LLP

By /s/ Richard W. Buckner
Attorneys for Defendants Lockheed
Martin Corporation and Samuel M. Ursini

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Semtek International, Inc.,	)	CASE NO.: CV 97-1580 ABC (RNBx)
Plaintiff,	)	
	)	**Order Re: Lockheed's**
vs.	)	**Motion for**
	)	**Permanent Injunction**
Lockheed Martin Corp., et al.,	)	
	)	
Defendants.	)	

Lockheed's Motion for Permanent Injunction came on regularly for hearing before this Court on August 11, 1997. After reviewing the materials submitted by the parties, argument of counsel, and the case file, it is hereby ORDERED that the Motion is DENIED.

I. Procedural Background

On February 26, 1997, Plaintiff SEMTEK INTERNATIONAL, INC. ("Plaintiff") filed a complaint in the Superior Court of the state of California for the county of Los Angeles against Defendants Lockheed MARTIN CORPORATION ("Lockheed"), SAMUEL URSINI ("Ursini"), and DOES 1 through 100. In that complaint, Plaintiff alleged four separate causes of action for: (1) inducing breach of contract; (2) intentional interference with economic advantage; (3) negligent interference with economic advantage; and (4) conspiracy to interfere with prospective economic advantage.

Lockheed first received a copy of the complaint on February 26, 1997. On March 11, 1997, Lockheed removed Plaintiff's action to this Court based on federal diversity jurisdiction under 28 U.S.C. §§ 1332 and 1441(b). At the time of Lockheed's removal, neither Lockheed nor Ursini had been served with the complaint. Plaintiff served the complaint upon Ursini on March 18, 1997, seven days after Lockheed filed its Notice of Removal. On April 11, 1997, Plaintiff filed a Motion to Remand. This Court denied Plaintiff's motion for remand on May 5, 1997. On that same date, the Court also granted Lockheed and Ursini's motion to dismiss under 12(b)(6) on the grounds that all claims stated were barred by California's two-year statute of limitations.[1]

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[1] In the prior action before this Court, Plaintiff alleged four separate causes of action for : (1) inducing breach of contract; (2) intentional interference with economic advantage; (3) negligent interference with economic advantage; and (4) conspiracy to interfere with prospective economic advantage. In its May 5, 1997 Order, the Court noted that California courts have held that the two-year statute of limitation specified by Cal. Civ. Proc. Code § 339(1) applies to such torts. *See e.g. Trembath v. Digardi*, 43 Cal. App. 3d 834, 836 (1974) (two-year statute of limitations for inducing breach of contract); *Kenworth v. Brown*, 248 Cal. App. 298, 301 (1967) (two-year statute for inducing breach of contract); *McFaddin v. H.S. Crocker Co.*, 219 Cal. App. 2d 585, 591 (1963), *superseded by statute on other grounds as stated in, Levine v. Pollack*, 37 Cal. App. 4th 129 (1995) (two-year statute of limitations for interference with business); *Anderson v. Allstate Ins. Co.*, 630 F.2d 677 (9th Cir. 1980) ("A cause of action for tortious interference with business relationships is governed by the two year statute of limitations.")

For purposes of the Court's statute of limitations analysis, Plaintiff's fourth claim for "civil conspiracy" was not directly considered. In California, there is no separate cause of action for "civil conspiracy." Plaintiff acknowledged this fact. [*See* Opposition to Motion to Dismiss at p. 8]. When a plaintiff has alleged a non-recognized action for "civil conspiracy" to commit a tort, the applicable statute of limitations is governed by the underlying tort without regard to allegations of conspiracy. *See e.g. Agnew v. Parks*, 172 Cal. App. 2d 756, 765 (1959) ("There exist[s] no cause of action for conspiracy in and of itself, [therefore,] the statute of limitations is determined by the nature of the action in which the conspiracy

On June 3, 1997, Plaintiff filed a notice of appeal of this Court's judgment to the Ninth Circuit. On July 2, 1997, Plaintiff filed an action in Maryland state court, entitled *Semtek Int'l Corp., v. Lockheed Martin Corp. & Does 1-100*, (Maryland case"). The Maryland case basically duplicated the factual allegations made in the prior action before this Court. In the Maryland case, however, Plaintiff's claims are subject to Maryland's three-year statute of limitations,[2] as opposed to California's two-year statute.

On July 23, 1997, Lockheed filed the instant Motion for Permanent Injunction under the All Writs Act, 28 U.S.C. § 1651(a). Specifically, Lockheed asserts that it is entitled to an order permanently enjoining Plaintiff from filing or continuing, in any federal or state forum, any action against Lockheed for claims which were adjudicated or could have been raised in the prior action before this Court. Plaintiff responded to the motion by filing its Opposition on July 30, 1997. Defendant filed it Reply on August 4, 1997.

II. Discussion

A. All Writs Act, 28 U.S.C. § 1651(a): Legal Standard

The All Writs Act, 28 U.S.C.§ 1651(a), defines this Court's power to issue injunctions prohibiting the relitigation of claims on which it has reached a judgment on the merits. In pertinent part, the All Writs Act provides that:

> The Supreme Court and all courts established by Act of Congress may issue all

is alleged."]).

[2] *See* Md. Cts. & Jud. Proc. Code Ann. § 5-101 ("A civil action at law shall be filed within three years of the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.")

> writs necessary or appropriate in acid of their respective jurisdictions and agreeable to the usages and principles of law.

[28 U.S.C.§1651(a)]. This language has been construed to vest federal courts with the discretionary power to issue an injunction under the All Writs Act to prevent a party from relitigating an existing federal judgment. *See Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1524 (9th Cir. 1983), *cert denied*, 465 U.S. 1091 (1984); *Clinton v. U.S.*, 297 F.2d 899, 901 (9th Cir. 1961), *cert denied*, 369 U.S. 856 (1962) (affirming injunction prohibiting relitigation of previously adjudicated claims). Even when the underlying case is no longer pending before the Court, it may still exercise jurisdiction over the parties for the purposes of such an injunction.[3] A district court may issue such an injunction, "notwithstanding the fact that the parties to the original action could invoke *res judicata* in state courts against any subsequent suit brought on the same matters." *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985).

However, "[s]ince an injunction preventing the relitigation of claims restricts an individual's access to the court system, it is an extraordinary remedy that should be narrowly tailored and rarely used." *Moy v. U.S.*, 906 F2d. 467, 470 (9th Cir. 1990) (citing to *Wood*, 705 F.2d at 1524-26; *Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984); *In re Packer Ave. Assoc.*, 884 F.2d 745, 747 (3d Cir. 1989)..

Additionally mere litigiousness does not justify issuing an injunction under 28 U.S.C.§1651(a): the "power [to issue an injunction to restrain the filing of meritless pleadings] is to be used sparingly and litigiousness alone will not support its

[3] "A district court retain jurisdiction to enforce judgments it [has] entere[d]." *Cook v. Peter Kiewit Sons Co.*, 775 F.2d 1030, 1036 (9th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986) (affirming, on *res judicata* grounds, an injunction against future actions) (quoting *Wood*, 705 F.2d at 1524).

invocation." *Winslow v. Romer*, 759 F. Supp. 670 (D. Colo. 1991). Finally, "[t]he issuing of such an injunction should be carefully approached, since access to the Courts is one of the cherished freedoms of our system of government." *Ex Parte Tyler*, 70 F.R.D. 456 (E.D. Mo. 1975).

B. Analysis

Lockheed's request for a permanent injunction is based on three basic contentions:

> (1) that a dismissal with prejudice of an action based solely on the ground that the two-year California statute of limitations has run is a "decision on the merits;"
>
> (2) that a judgment on the merits issued by a District Court precludes any other actions based on similar claims from being brought in other forums with different statutes of limitations; and
>
> (3) that, under the factual circumstances presented by the instant case, a District Court may issue a permanent injunction under the All Writs Act, 28 U.S.C. 1651(a) to prevent a party from relitigating an existing federal judgment.

The Court will address each of these contentions in turn.

1. Preclusive Effect of Federal Diversity Judgment Upon Subsequent State Court Action

Lockheed contends that this Court's dismissal with prejudice of the Plaintiff's action, which was based solely on the two-year California statute of limitations, is a "judgment on the merits" of the action, which would preclude Plaintiff's subsequently-filed Maryland state court action despite the fact

that Maryland's three-year statute of limitations would allow the action. For purposes of Lockheed's requested injunctive relief, the Court does not consider to be obvious that *res judicata* would apply to bar Plaintiff's Maryland state court action.

Lockheed cites to one Ninth Circuit case and one Northern District of California case for the proposition that a judgment dismissing a complaint for failure to state a cause of action based on the statute of limitations grounds is a final judgment on the merits. *See Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1330 n.3 (9th Cir. 1981); *Salveson v. Western States Bankcard Assoc.* 525 F. Supp. 566, 582 (N.D. Cal.1981), *aff'd in relevant part*, 731 F.2d 1423, 1430 (9th Cir. 1984). These cases are the only cases within the Ninth Circuit that support Lockheed's proposition.[4] Both are distinguishable based on the divergent facts presented by the matter at issue here.

In *Ellingson*, the Ninth Circuit opined, in a footnote, that "[a] judgment based on the statute of limitations is 'on the merits.'" *Ellingson*, 653 F.2d at 1330 n.3 (9th Cir. 1981), *citing Mathis v. Laird*, 457 F.2d 926, 927 (5th Cir.), *cert denied*, 409 U.S. 871 (1972). However, the *Ellingson* opinion dealt with two antitrust actions — the first adjudicated in federal district court in Oregon, and the second filed in the Northern District of California. In the prior action, the Oregon district court found that the action was barred by the statute of limitations for federal antitrust actions. In the second action, the California district court found, and the Ninth Circuit affirmed, that a subsequent federal antitrust action based on essentially the same facts was precluded by *res judicata* principles.

Ellingson, therefore, involved preclusion based on the application of a single federal statute of limitations to a subsequent federal antitrust action brought in a second federal court. In contrast, Lockheed's requested injunction in this

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[4] Of course, the Northern District of California opinion is not binding upon this Court.

matter would entail preclusion based on the application of the California statute of limitations to a subsequent action based on Maryland state law brought in Maryland state court. To make matters more complicated, California and Maryland have divergent limitation periods — Plaintiff's action is time-barred in California, but not in Maryland. In short, the instant matter before this Court does not present the relatively simple factual situation resolved in *Ellingson*.[5]

Salveson was also based on federal antitrust allegations and relied solely upon *Ellingson* for the proposition that a ruling on the statute of limitations "on the merits." Accordingly, *Salveson* is also distinguishable from the present case.[6]

As Lockheed concedes in it Reply,[7] the Ninth Circuit applies the forum state's law to determine the *res judicata* preclusive effect of prior federal diversity jurisdiction. *See Bates v. Union Oil Co. of California*, 944 F.2d 647, 649 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992). Therefore, this Court would have to apply state law in order to determine

---

[5] Furthermore, *Mathis v. Laird* — the case upon which the *Ellingson* [decision] relied in ruling that an application of the statute of limitations is a judgment "on the merits" — is also factually distinguishable. In *Mathis*, an identical statute of limitations applied to both the prior action and the subsequent action. Additionally, the claimant filed both actions in federal court — the first in the Court of Claims, and the second in Federal District Court. Unlike the situation presented by the instant matter, the *Mathis* court found the dismissal based on statute of limitations grounds to be a judgment on the merits in a situation where both actions were adjudicated in federal court and both were subject to the same statute of limitations.

[6] In *Salveson*, although the second action was brought in state court, the federal court allowed removal and dismissed the matter on res judicata grounds because it held that the second action itself was rooted in federal law and was in state court only through artful pleading by the claimants. In contrast, Plaintiff in this case has twice brought purely state law claims in two different state courts. This court allowed removal of the first action based purely upon diversity of citizenship. There was, and is, no federal character to Plaintiff's claims before this Court or the Maryland state court.

[7] *See* Reply at p. 4, n. 5.

whether a ruling on the California statute of limitations would be a judgment on the merits sufficient to preclude a subsequent action in Maryland state court. Both California and Maryland apply federal law to determine the preclusive effect of prior federal judgment. *See Levy v. Cohen*, 19 Cal.3d 165, 172-73 (1977); *Kent v. County Board of Education v. Bilbrough*, 309 Md. 478, 493 (1987).

In support of its argument that federal *res judicata* principles would apply to bar Plaintiff's action in Maryland, Lockheed relies heavily on two cases from outside the Ninth Circuit[8] — *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989) and *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044 (5th Cir. 1989). Both cases, however, are somewhat distinguishable from the facts currently before the Court. For example, in both *Shoup* and *Thompson Trucking*, the respective plaintiffs had statutory time-bar judgments entered against them in one federal district court, and attempted to relitigate the claims in a second federal court.[9] In order to prevent forum-shopping among the various federal districts, both the Fourth and Fifth Circuits held that plaintiffs' subsequent actions were barred.

In the instant case, however, Plaintiff, unlike the plaintiffs in *Shoup* and *Thompson Trucking*, has not purposefully availed itself of a second federal forum.[10] Plaintiff filed both its first and second actions in state courts — California and Maryland,

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[8] The absence of Ninth Circuit authority addressing the factual and legal circumstances of this case is yet another factor that cautions against this Court's exercise of discretion to grant the requested injunction.

[9] In *Shoup*, the plaintiff filed her second claim in *both* federal and state court. The defendant later removed the state action to federal court and the cases were consolidated.

[10] In fact, Plaintiff never purposefully availed himself of a federal forum at all. In the initial action before this Court, Defendants removed the action, properly, from California state court based on diversity of citizenship.

respectively.[11] Assuming that the Maryland case is remanded to Maryland state court, the *Shoup* and *Thompson Trucking* holdings would not apply. In the Court's opinion, both holdings were animated primarily by an interest in preventing forum-shopping among the federal district courts, which is an unnecessary and wasteful burden upon the federal court system.[12] *See Thompson Trucking*, 870 F. 2d at 1046 (".

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[11] The Court is informed that Lockheed has removed the Maryland state action to the federal district court in Maryland based on federal question jurisdiction under a somewhat strained interpretation of removal jurisdiction under the All Writs Act and the potential application of federal *res judicata* principles. Lockheed's theory of removal jurisdiction, as the Court understands it, is identical to the theory that was expressly rejected by the Ninth Circuit in *Ultramar v. Dwelle*, 900 F.2d 1412, 1417 (9th Cir. 1980) ("We hold that when the prior federal judgement was grounded in state law, the state claims contained in a subsequent action filed in state court cannot be characterized as federal [based on a potential *res judicata* effect of the prior federal judgment] for purposes of removal."). The determination of removal jurisdiction, however, is properly before the federal district court in Maryland, not this Court.

[12] Both *Shoup* and *Thompson Trucking* were distinguished by the Seventh Circuit in *Reinke v. Boden*, 45 F.3d 166, 171 (7th Cir. 1995) on the following grounds:

> We do not believe that (*Shoup*, *Thompson Trucking*, and other cited cases can control the situation we have before us. These cases involve situations in which the original adjudication as well as the second suit were in a federal district court. Whatever might be the merit of this approach in cases that involve successive suits in the federal courts — and there has been serious criticism — the rationale of these decisions cannot control our case. Unlike any of these cases, we do not have before us two successive federal suits. This difference is not a formalistic one. An intrasystem use of res judicata for dismissals on the ground of expiration of a statute of limitations promotes judicial economy within that system. Therefore, it is in the interest of that system to give res judicata effect to the first judgment. . . . In the context of the intersystem use of res judicata, however, the intent of

> the first forum to save the resources of the second cannot be so readily presumed. The first forum does not share the same interest in restricting the scope of its judgment because any subsequent suit will take place in the forum of another system.

45 F. 3d at 171.

. . the prospect of compelling the already overburdened district courts of the United States to hear the same claims over and over again in different states is, in our view, unappealing.").[13] However, the Fourth and Fifth Circuits do not, and could not, speak to what a state court would do when confronted with facts similar to those presented by this case.[14] Therefore, the determination of whether this Court's dismissal of Plaintiff's initial action, based on California's two-year statute of limitations, operates to preclude Plaintiff's second state-court

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[13] Ironically, if the federal court system is to be burdened by two successive federal actions in this matter, the burden will be caused by Lockheed's successive removals, not Plaintiff's successive state court complaints.

[14] One could argue, as Plaintiff apparently does, that a state court confronted with a prior federal judgment based solely on the application of another state's statute of limitations would treat the prior federal judgment the same as it would treat a prior judgment of another state. In this event, the Restatement 2d of Judgments and the Restatement 2d of Conflict of Laws counsel that a state court need not afford preclusive effect to a prior statutory time-bar judgment from another state with less lenient statute of limitations. *See* Rest. 2d Judgments, § 19, Comment f; Rest. 2d Conflict of Laws, § 95, Comment c.

One could also argue, as Lockheed apparently does, that the state court would regard the prior federal judgment in the same way that a second federal court would regard it. If so, Fourth and Fifth Circuit authority may counsel the state court to find the second claim barred (the Seventh Circuit may counsel the state to do otherwise).

However, it would be highly ironic if the state court decision to preclude or allow a subsequent action would turn solely upon whether the prior judgment was entered by a federal court sitting in diversity in a given state or by a state court in that same state, both of which apply the same state law.

action in Maryland is properly left to the Maryland state or district court. Because it is unclear where Plaintiff's second lawsuit will be heard, and because the resolution of the *res judicata* issue is far from obvious, the Court declines to determine the issue. As will be seen below, the uncertainties in the proper forum and ultimate resolution of the *res judicata* issue also convince the court that it should decline to exercise its discretion under the All Writs Act.

2. District Court Discretion under the All Writs Act

Lockheed contends that this Court *may* issue a permanent injunction under the All Writs Act to prevent Plaintiff from relitigating an existing federal judgment. As a general proposition of law, the Court agrees with Lockheed's contention. However, the proposition that the Court *may* grant permanent injunctive relief under the All Writs Act in an appropriate case does not command that the Court *must* grant Lockheed the relief it seeks in this case.

The federal courts' power under 28 U.S.C. 1651(a) to issue injunctions against repetitive litigation is completely discretionary. Moreover, as noted above, this discretion should be exercised with a particularly high level of caution.

In the matter at bar, Plaintiff has filed only one subsequent action against Lockheed — the Maryland case. Besides the filing in Maryland, Lockheed has not shown evidence of any intention on the part of Plaintiff to perpetually relitigate its claims in all other available forums. Further, Lockheed has offered no evidence that Plaintiff's action could potentially be brought in any fora besides California and Maryland.[15]

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[15] Any actions filed subsequently by Plaintiff would be clearly barred by statute of limitations of three years or less. Lockheed has not provided evidence to the Court of any jurisdiction, with proper venue, where a subsequently-filed action would not be time-barred.

Additionally, legal remedies other than the extraordinary remedy of permanent injunctive relief are available to Lockheed.[16] Lockheed's argument that the doctrine of *res judicata* bars the Maryland case may be brought before the proper court in a motion to dismiss or motion for summary judgment based on *res judicata* preclusion. As the Court concluded in its discussion above, that matter can properly be decided by the appropriate court in Maryland, not by this Court.[17]

Further, this Court is not convinced that the single action filed by Plaintiff in Maryland rises to the level of vexatious relitigation which would warrant use of the rather extreme remedy that Lockheed requests. Plaintiff has not filed subsequent actions that are either "numerous" or "patently without merit." *See In re Oliver*, 682 F.2d 443, 446 (3d Cir. 1982). The Court does not view this chronology as one in which the Court is justified in summarily precluding Plaintiff's access to the courts. This Court's prior order did not reach the substantive merits of Plaintiff's tort claims. If another proper forum will afford Plaintiff the opportunity to fully litigate the merits of its causes of action, without applying a statutory or *res judicata* bar, the Court does not find it appropriate to bar Plaintiff from proceeding in that forum. Accordingly, the Court declines to exercise its discretion under the All Writs Act, 28

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[16] In the Ninth Circuit, the basis for injunctive relief includes "inadequacy of legal remedies." *Sierra Club v. Penfold* 857 F.2d 1307, 1318 (9th Cir. 1988).

[17] Additionally, for reasons noted above in Section II(B)(1), it is not obvious to this Court that *res judicata* applies to bar Plaintiff's action in Maryland state court. Further, the Court is not convinced that the matter is properly removable to Maryland federal district court. However, the Court must reiterate that these issues are properly decided by the proper court in Maryland, and any dicta or other discussion within this opinion should not be cited or argued as persuasive authority for the Maryland courts' consideration of the issues of removal jurisdiction and *res judicata* preclusion.

U.S.C. 1651(a) and DENIES Lockheed's Motion for Permanent Injunction.

III. Conclusion

For all the reasons set forth above, the Court hereby ORDERS that Lockheed's motion for a permanent injunction prohibiting Plaintiff from filing any actions in any other fora based on the claims litigated in this Court is DENIED.

SO ORDERED.

DATED: August 11, 1997

/s/ Audrey B. Collins
AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE

(2)

No. 99-1551

Supreme Court, U.S.
FILED
MAY 19 2000
CLERK

IN THE

Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Hanna v. Plumer*, 380 U.S. 460 (1965), Federal Rule of Civil Procedure 41(b) governs the preclusive effect of a federal diversity court's dismissal on statute of limitations grounds.

PARTIES TO THE CASE

The petitioner, appellant below, is Semtek International Incorporated, referred to herein as "Semtek." The respondent, appellee below, is Lockheed Martin Corporation, referred to herein as "Lockheed."

Pursuant to this Court's Rule 29.6, Lockheed states that it has no parent company and that no publicly held company owns more than 10% of Lockheed's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE CASE ii

STATEMENT OF THE CASE 1

A. The California Proceedings. 1

B. The Maryland Proceedings. 3

C. The Decision Below. 5

REASONS FOR DENYING THE PETITION 6

I. THERE IS NO CONFLICT ON THE ISSUE PRESENTED BY THIS CASE: APPLICATION OF A FEDERAL RULE OF CIVIL PROCEDURE TO A FEDERAL DIVERSITY ACTION 7

A. This Case Is Controlled by *Hanna v. Plumer*. 8

B. The Lower Courts Are In Agreement That a Controlling Federal Rule of Civil Procedure Governs the Res Judicata Effect of a Diversity Judgment. 11

C. Federal Rule of Civil Procedure 41(b) Is a Valid Exercise of Congress' Rulemaking Authority and Controls the Preclusive Effect of a Dismissal on Statute of Limitations Grounds. 15

II. THE CALIFORNIA FEDERAL DISTRICT COURT DECISION TO DISMISS SEMTEK'S CLAIM "ON THE MERITS" IS NOT SUBJECT TO COLLATERAL ATTACK IN THE MARYLAND COURTS. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Andes v. Paden, Welch, Martin & Albano P.C.,
897 S.W.2d 19 (Mo. Ct. App. 1995).....12, 17

Answering Service, Inc. v. Egan,
728 F.2d 1500 (D.C. Cir. 1984).....13

Baldwin v. Iowa State Traveling Men's Association,
283 U.S. 522 (1931).....19

Burlington Northern Railroad Co. v. Woods,
480 U.S. 1 (1987)..... passim

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,
498 U.S. 533 (1991).....16

Cemer v. Marathon Oil Co.,
583 F.2d 830 (6th Cir. 1978).....12, 19

Chase Manhattan Bank, N.A. v. Celotex Corp.,
56 F.3d 343 (2d Cir. 1995).....13

Collins v. Sigmon,
385 S.E.2d 835 (S.C. 1989).....12

Dasha v. Maine Medical Center,
No. 93-3856-G, 1996 WL 365995 (Mass. Super. Ct. June 25, 1996).....12

Dupasseur v. Rochereau,
88 U.S. (21 Wall.) 130 (1874).....7, 10, 14

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938)..... passim

Gelb v. Royal Globe Ins. Co.,
798 F.2d 38 (2d Cir. 1986).....13, 15

TABLE OF AUTHORITES
(continued)

Page

Hanna v. Plumer,
380 U.S. 460 (1965)..... passim

Harborside Refrigerated Services, Inc. v. Vogel,
959 F.2d 368 (2d Cir. 1992).....15

Hart v. Yamaha-Parts Distributors, Inc.,
787 F.2d 1468 (11th Cir. 1986).....12

Havoco of America v. Freeman, Atkins & Coleman, Ltd.,
58 F.3d 303 (7th Cir. 1995).....14, 15

Hillary v. Trans World Airlines, Inc.,
123 F.3d 1041 (8th Cir. 1997).....13

In re Kaplan,
143 F.3d 807 (3d Cir. 1998).....15

Kern v. Hettinger,
303 F.2d 333 (2d Cir. 1962).....11, 12

Kudaroski v. Hellmuth,
No. 79-2489-C, 1981 U.S. Dist. LEXIS 9476 (D. Mass. Mar. 16, 1981).....20

Lubrizol Corp. v. Exxon Corp.,
929 F.2d 960 (3d Cir. 1991).....14, 15

Martin-Trigona v. Gouletas,
433 N.E.2d 1132 (Ill. App. Ct. 1982).....12

Murphy v. Klein Tools, Inc.,
935 F.2d 1127 (10th Cir. 1991).....12

NAACP v. Hunt,
891 F.2d 1555 (11th Cir. 1990).....12

Nasser v. Isthmian Lines,
331 F.2d 124 (2d Cir. 1964).....20

TABLE OF AUTHORITES
(continued)

Page

Petromanagement Corp. v. Acme-Thomas Joint Venture,
835 F.2d 1329 (10th Cir. 1988).....12

PRC Harris, Inc. v. Boeing Co.,
700 F.2d 894 (2d Cir. 1983).....12, 17, 20

Reinke v. Boden,
45 F.3d 166 (7th Cir. 1995).....17

Rivet v. Regions Bank,
522 U.S. 470 (1998).....3

Semler v. Psychiatric Institute,
575 F.2d 922 (D.C. Cir. 1978).....14

Shoup v. Bell & Howell Co.,
872 F.2d 1178 (4th Cir. 1989).....12, 17

Treinies v. Sunshine Mining Co.,
308 U.S. 66 (1939).....19, 21

STATUTES

28 U.S.C. § 1441(b).....2

28 U.S.C. § 1652.....9

28 U.S.C. § 2072.....9

Fed. R. Civ. P. 41(b).....passim

OTHER AUTHORITIES

Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976).....13

Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945 (1998).....10, 13, 14

TABLE OF AUTHORITES
(continued)

Page

Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L.J. 289 (1993).....8, 13, 14

Restatement (Second) of Judgments § 87 (1982).....13

Charles Alan Wright et al., *Federal Practice and Procedure* (2d ed. 1996).....9, 14, 16, 17

STATEMENT OF THE CASE

This case originates with the decision of petitioner Semtek International Inc. ("Semtek") to bring its suit against Lockheed Martin Corporation ("Lockheed") in California after the California limitations period had expired. When this strategic misstep led to dismissal of its California action by a federal diversity court, Semtek sought to rectify the situation by bringing precisely the same lawsuit against Lockheed again, this time in a forum with a more generous statute of limitations. But as the court below explained, "Federal law . . . does not permit a plaintiff to shop indefinitely for favorable statutes of limitations in every state where personal jurisdiction over a defendant might be found." Pet. App. 20a-21a (internal quotation marks omitted).[1]

Instead, Federal Rule of Civil Procedure 41(b) gives res judicata effect to federal court statute of limitations dismissals, and thus bars exactly the type of duplicative litigation at issue here. Federal Rule 41(b) governs this case under well-established law, and there is no lower court conflict on this point. That Semtek is precluded from litigating in Maryland a case that it has already lost in California district court is an unexceptional and entirely predictable application of Rule 41(b). Nothing about this result warrants the Court's attention.

A. The California Proceedings.

In February 1997, Semtek filed its first lawsuit against Lockheed in California state court, alleging business torts. Lockheed, an out-of-state defendant, removed the case to federal district court based on diversity of citizenship. Pet.

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[1] The abbreviation "Pet. App." is used throughout to refer to the appendix to the petition for certiorari.

App. 2a.[2]

Because Semtek's own complaint and representations established that California's two-year statute of limitations had expired, Lockheed moved the district court to dismiss the action on limitations grounds. The district court granted the motion and dismissed the action. In its final judgment, issued on May 8, 1998, the district court specified that its dismissal was "on the merits" and "with prejudice."' Pet. App. 2a-3a. At the time, Semtek did not object to the court's decision to render a dismissal "on the merits," and it did not seek to amend or clarify the judgment under the Federal Rules of Civil Procedure.

Semtek appealed the statute of limitations dismissal to the Ninth Circuit. Semtek did not contend that the district

[2] Petitioner takes this opportunity to argue that because it subsequently served an in-state defendant (a former Lockheed employee), "there was no evident basis for removal." Pet. 3. Semtek advanced this flawed argument in an unsuccessful effort to have its case remanded to California state court and there is no need to refight the battle here. Lockheed simply notes, again, that complete diversity was at all times present in the California action. Because Semtek failed to serve the Lockheed ex-employee who resided in California before removal, there was, contrary to Semtek's argument, *see* Memorandum in Support of Motion to Remand (filed May 5, 1997, C.D. Cal.), no "properly joined and served . . . defendant [who was] a citizen of the State in which [the] action [was] brought" at the time of removal, *see* 28 U.S.C. § 1441(b), and removal was therefore proper. The district court denied Semtek's remand motion, and Semtek did not appeal.

Nor is there any basis for petitioner's suggestion that Lockheed somehow abused Semtek's "courtesy" in removing the case before Semtek served its in-state defendant. Pet. 3, 26-27 n.21. Lockheed did not learn of Semtek's complaint by receipt of a "courtesy copy" from Semtek, but instead obtained the complaint from the court record after one of its outside counsel had noted the filing of the action.

court erred in rendering a judgment "on the merits" or object in any way to the form of the judgment. On February 25, 1999, the Ninth Circuit affirmed the district court dismissal. Pet. App. 3a. Semtek did not petition for certiorari from that judgment.

B. The Maryland Proceedings.

While its Ninth Circuit appeal was pending in July 1997, Semtek filed its second lawsuit against Lockheed in Maryland state court, raising business tort claims identical to those it alleged in California. Relevant Maryland law provided for a three-year statute of limitations. Pet. App. 3a.

Lockheed sought an injunction in the California federal district court barring Semtek from litigating in Maryland claims that had already been presented in the California proceedings. The California district court was "not convinced that the single action filed by [Semtek] in Maryland rises to the level of vexatious litigation" that would warrant relief under the All Writs Act, 28 U.S.C. §1651(a), and declined to exercise its discretion to enjoin the Maryland litigation. Pet. App. 4a-5a.

Lockheed also removed the Maryland state court case to federal district court in Maryland. Relying on then-current Fifth Circuit precedent, Lockheed asserted as grounds for removal that it would raise the affirmative defense of res judicata based on the California federal district court judgment, and thus present a federal question for review. The Maryland district court disagreed with Lockheed's argument and the Fifth Circuit case law, and granted Semtek's motion to remand the case to Maryland state court. Pet. App. 4a-5a.[3]

[3] It was not until after Lockheed sought removal that this Court resolved the lower court conflict on whether federal removal could be predicated on an alleged affirmative federal defense. *See Rivet v. Regions Bank*, 522 U.S. 470 (1998) (affirmative federal defense not grounds for removal).

With the case returned to Maryland state court, Lockheed moved to dismiss on res judicata grounds. Contrary to petitioner's suggestion, Pet. 4 & n.3, Lockheed did not concede that Semtek's action was timely under the three-year Maryland limitations period; in fact, it is Lockheed's position that Semtek's complaint is barred by the Maryland statute of limitations. But for purposes of its motion to dismiss, Lockheed argued only that the California district court's dismissal precluded Semtek from filing the same claim in Maryland. Opposing the motion, Semtek argued that the statute of limitations dismissal was not "on the merits" and thus not entitled to res judicata effect.

The Maryland trial court agreed with Lockheed and granted its motion to dismiss. Pet. App. 36a-47a. The court began by identifying the Federal Rule of Civil Procedure that speaks to the preclusive effect of statute of limitations dismissals: Federal Rule 41(b), which provides in relevant part that "unless the Court in its order for dismissal otherwise specifies, a dismissal . . . other than [one] for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Pet. App. 39a. The court held that the preclusive effect of the California district court dismissal was governed by the Federal Rule directly on point, rather than by the California state law urged by Semtek. For this point, the court relied on uniform federal and state case law applying Rule 41(b), where relevant, to measure the preclusive effect of federal diversity court dismissals. Pet. App. 40a-46a. And under the "plain language" of Rule 41(b), the court concluded, the California district court's limitations dismissal was an "adjudication on the merits" entitled to res judicata effect. Pet. App. 39a.

Semtek appealed the trial court judgment to the intermediate Maryland appellate court. It also, for the first time, moved in California to amend the federal district court's by then 18-month old judgment to specify that the limitations dismissal was *not* on the merits – which would mean that

under the terms of Rule 41(b), it would not be treated as a merits adjudication with res judicata effect. With full knowledge that the Maryland action had been dismissed, the California federal district court denied the request for relief. The Ninth Circuit also denied Semtek's motions, on procedural grounds. Pet. App. 11a-12a.

C. The Decision Below.

The Maryland Court of Special Appeals affirmed the trial court decision applying Federal Rule of Civil Procedure 41(b) and giving the California district court dismissal res judicata effect. Reviewing extensive and consistent case law on precisely the question presented here – whether Federal Rule 41(b) governs the preclusive effect of a federal diversity court's dismissal on limitations grounds – the court concluded that the Federal Rule, and not California res judicata law, governs. Pet. App. 12a-16a, 19a-21a, 23a-30a. And under the plain terms of Rule 41(b), the court held, California district court's limitations dismissal, which actually specified that it was "on the merits and with prejudice," was clearly an "adjudication on the merits" entitled to res judicata effect. Pet. App. 8a-12a.

The appellate court also rejected Semtek's argument for application of state law on the grounds that it constituted an impermissible collateral attack on the California district court judgment. Pet. App. 31a-32a. Semtek's argument, the court recognized, turned on the premise that the California district court, sitting in diversity, was bound under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to apply the res judicata law of its forum state. Under *Erie*, according to Semtek, the California federal court should have applied California law and held that its limitations dismissal was *not* on the merits – and because California law should have governed in the federal district court, Semtek argued, it should govern in Maryland, as well. Pet. App. 31a. The court rejected this argument on the merits. But even if it were correct, the court held,

> Semtek's appeal to this court is totally inappropriate. If the federal district court judgment was in any way in error, Semtek's remedies were 1) post-trial motions to the federal district court itself, 2) an appeal to the [Ninth Circuit], and 3) a petition for *certiorari* to the Supreme Court of the United States. It is not the job of an intermediate appellate court in Maryland . . . to reverse, to overrule, to modify, to alter, to amend, or to reform the judgment of the United States District Court for the Central District of California.

Pet. App. 32a.

Semtek petitioned for discretionary *certiorari* review in Maryland's highest court of appeals. The Court of Appeals denied review. Pet. App. 35a.

REASONS FOR DENYING THE PETITION

Though it is not apparent from the petition, this is a case about application of a Federal Rule of Civil Procedure – Rule 41(b), governing the effect of dismissals – to a federal diversity judgment. Once the issue in this case is properly identified, petitioner's "conflict" simply evaporates. There is no disagreement in the courts over application of the Federal Rules of Civil Procedure, where relevant, to determine the preclusive effect of a federal diversity judgment – which is not surprising, as this issue is controlled by the Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965). Nor is there any question as to the validity or meaning of Rule 41(b) as it pertains to dismissals on statute of limitations grounds. These are the only issues actually implicated by this case, and neither of them merits this Court's review.

Even if the Court were inclined to revisit *Hanna* and its implications for the Federal Rules of Civil Procedure, this case would not provide an opportunity to do so. The res judicata issue here was resolved by the California district court, when it dismissed Semtek's case "on the merits" con-

sistent with Rule 41(b). Under well-established precedent of this Court, the proper avenue for challenging that decision would have been appeal and certiorari in the California proceedings. Petitioner's collateral attack in the Maryland litigation was barred, as the Maryland court properly held, and the question petitioner presents is not before the Court in these proceedings.

I. THERE IS NO CONFLICT ON THE ISSUE PRESENTED BY THIS CASE: APPLICATION OF A FEDERAL RULE OF CIVIL PROCEDURE TO A FEDERAL DIVERSITY ACTION.

In support of its position that California law should govern the res judicata effect of the federal district court dismissal, petitioner relies virtually exclusively on the 1874 case of *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130. But *Dupasseur* addresses a question entirely different from the one presented here.

Whether state or federal law should dictate the preclusive effect of a federal diversity judgment is not really one question, as petitioner would have it, but two. The first arises when a court must decide, in the absence of a relevant Federal Rule of Civil Procedure, whether state law or federal common law should fill the gap and supply the general res judicata principles applicable to a diversity judgment. That was the question decided in *Dupasseur*, which predated the Federal Rules of Civil Procedure by a good half-century. But it is not a question presented by this case

The other question arises when a Federal Rule of Civil Procedure – in this case, Rule 41(b) – speaks directly to the res judicata issue in dispute, so that the choice is between state law and application of a *Federal Rule* to a prior federal diversity judgment. On that question, the only one implicated by this case, *Dupasseur* has no bearing. And on that question, there is no disagreement in the lower courts: under this Court's decisions in *Hanna v. Plumer*, 380 U.S. 460

(1965), and *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), the governing law is the relevant Federal Rule.

A. This Case Is Controlled by *Hanna v. Plumer*.

The first step of the choice-of-law analysis in this case is not disputed. The "recognizing" court – here, the Maryland court – applies the res judicata law that would govern in the prior "rendering" court – here, the California federal district court. "[A] court must give a foreign judgment no more and no less force and effect than would the court which rendered it." Brief of Appellant Semtek (filed Nov. 30, 1998, Md. Ct. Sp. App.) at 19 (emphasis omitted) ("Brief of Appellant"); *see also* Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L.J. 289, 315-16 (1993) ("It is generally the practice of courts faced with determining the effects of a judgment to examine the res judicata law of the rendering court.").

But that leaves unanswered the "ultimate" question of what law governs in the rendering federal diversity court, Lilly, *supra*, at 319, and it is at this second step of the analysis that Semtek makes its argument for California law. Under *Erie Railrodd Co. v. Tompkins*, 304 U.S. 64 (1938), petitioner argues, the rendering diversity court must look to *state* res judicata law, at least so far as that law is deemed "substantive" for *Erie* purposes. Because the law governing the scope of a judgment is considered "substantive" under *Erie*, petitioner contends, *California* law governs in the rendering diversity court – and thus in Maryland, as well. Brief of Appellant at 21-22; Pet. App. 30a-34a.[4]

Whatever merit it might have in a different context, *see infra* at 14, Semtek's *Erie* argument has no application here,

[4] Lockheed does not concede that the res judicata issue in dispute is "substantive" for *Erie* purposes. But because Semtek's entire *Erie* analysis has no bearing on this case, as shown below, the Court need not reach the question here.

for the simple reason that this is not an *Erie* case. Because there is a Federal Rule of Civil Procedure – Rule 41(b) – directly on point, the case that governs is not *Erie* but *Hanna v. Plumer*, 380 U.S. 460 (1965), and the law that governs the res judicata effect of the diversity judgment is not state law but the Federal Rule.

In *Hanna*, the Court rejected the very argument on which Semtek's position depends: that a federal diversity court must apply state law to an issue "substantive" under *Erie*, even if a Federal Rule of Civil Procedure covers the same issue. The "fundamental" problem with this argument, the Court held, was the "incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure." 380 U.S. at 469-70. The traditional *Erie* inquiry is simply inapposite when a "situation is covered by one of the Federal Rules." *Id.* at 471.[5]

Instead, the Court held in *Hanna*, the validity and applicability of a Federal Rule of Civil Procedure are measured under the Rules Enabling Act, 28 U.S.C. § 2072, which pro-

[5] This conclusion is a matter of straightforward statutory construction. *Erie* rests, first and foremost, on the Rules of Decision Act, 28 U.S.C. § 1652, which provides in relevant part that "[t]he laws of the several states, except where [statutes of the United States] shall otherwise require or provide, shall be regarded as rules of decision" in federal courts. In *Erie*, the Court interpreted the term "laws of the several states" to include common law as well as statutory law, so that under the Rules of Decision Act, federal courts sitting in diversity were required to apply state law to most substantive issues before them. *Erie*, 304 U.S. at 71-73; *see generally* 19 Charles Alan Wright et al., *Federal Practice and Procedure* § 4502, at 4 (2d ed. 1996) ("Wright & Miller"); *id.* § 4503, at 18-23. But when a Federal Rule is at issue, as *Hanna* recognized, neither the Rules of Decision Act, which specifically exempts from its scope matters covered by another federal law, nor the Court's reading of that statute in *Erie*, controls. 380 U.S. at 471; *see generally* 19 Wright & Miller § 4508, at 246-49.

vides for a uniform system of rules governing practice and procedure in the federal courts. So long as a Federal Rule is authorized under the Constitution and the Rules Enabling Act, it applies to a federal diversity judgment – regardless of what might have been the outcome under the traditional *Erie* inquiry. 380 U.S. at 471. And Congress' rulemaking authority under the Constitution and the Act is broad enough to reach not only matters "procedural" for *Erie* purposes, but also matters "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Id.* at 471-72. Even where they might "incidentally affect litigants' substantive rights," that is, the Federal Rules are presumed valid and applicable. *See Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5-6 (1987) (applying *Hanna* and holding that Federal Rule of Appellate Procedure, rather than contrary state law, governs federal diversity judgment). In short, a Federal Rule that covers the issue "trumps" traditional *Erie* analysis and effectively preempts inconsistent state preclusion law. *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 1006 (1998).

Because the applicability of a Federal Rule of Civil Procedure is a Rules Enabling Act question, *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), obviously has no relevance when, as in this case, there is a Federal Rule at issue. *Dupasseur*, of course, did not purport to interpret the Rules Enabling Act, which was enacted sixty years later in 1934. Nor could it involve any of the Federal Rules of Civil Procedure, promulgated in 1938. The point here is not that *Dupasseur* has been overruled *sub silentio* or somehow undermined by later developments. *See* Pet. 13 (arguing that "status" of *Dupasseur* is unclear). Quite apart from its status in other contexts, *Dupasseur* simply has no application when the choice of res judicata principles is not between state and federal *common* law but rather between state law and a *Federal Rule of Civil Procedure*, where the Rules Enabling Act is controlling.

In sum, *Hanna* makes clear that petitioner's *Erie* argument is entirely irrelevant to this case, and eliminates with it any basis for applying California state law. Federal Rule of Civil Procedure 41(b) "control[s] the issue" in dispute here, *Burlington Northern*, 480 U.S. at 5, providing that a statute of limitations dismissal is "on the merits" for res judicata purposes unless otherwise specified. *See infra* at 16. Under *Hanna*, Rule 41(b) and not state law properly applied when the district court ruled that its limitations dismissal was "with prejudice" and "on the merits," instead of specifying that its order should have no res judicata effect. Pet. App. 58a-59a. Because the Federal Rule rather than state law governed this res judicata issue in the rendering diversity court, the Maryland recognizing court had no reason to "look behind" the federal court judgment to California state law. App. 16a.

B. The Lower Courts Are In Agreement That a Controlling Federal Rule of Civil Procedure Governs the Res Judicata Effect of a Diversity Judgment.

The decision below is entirely consistent with other decisions addressing the question actually presented by this case: whether a controlling Federal Rule of Civil Procedure governs the res judicata effect of a federal diversity judgment. On this point, there is no disagreement among the courts, and petitioner cites no case in which a Federal Rule speaking to the disputed issue is actually rejected in favor of state res judicata law. Instead, the courts uniformly apply relevant Federal Rules to determine the preclusive effect of federal diversity judgments.

Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962), for instance, which Semtek cites as a leading case for application of federal law generally, Pet. 14, is actually a Rule 41(b) case. In *Kern*, the court held that Rule 41(b) governed the preclusive effect of a dismissal for want of prosecution by a California district court sitting in diversity. Because Rule 41(b) spoke directly to the question, the court was able to

summarily reject an *Erie* argument for application of California law: "The *Erie* doctrine is not applicable here." 303 F.2d at 340 (citation omitted). Likewise, two of the cases on which the Maryland court below relied most heavily – *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180-82 (4th Cir. 1989), and *Andes v. Paden, Welch, Martin & Albano P.C.*, 897 S.W.2d 19, 21-23 (Mo. Ct. App. 1995) – also turn on application of Rule 41(b), and hold that the Federal Rule, rather than state law, measures the preclusive effect of dismissals by federal diversity courts. Pet. App. 19a-21a, 29a-30a.

The pattern holds through all of the cases cited by petitioner. In every case in which the court identifies a Federal Rule that covers the disputed res judicata issue, the court applies the Federal Rule and not state law to the prior diversity judgment. *See PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896-97 (2d Cir. 1983) (applying Rule 41(b)); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) (applying Rule 41(b)); *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir. 1991) (applying Rule 41(b)); *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990) (discussing state law but applying Rule 41(b)); *Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986) (applying Rule 41(b)); *Collins v. Sigmon*, 385 S.E.2d 835, 837 (S.C. 1989) (applying Rule 41(b)); *Martin-Trigona v. Gouletas*, 433 N.E.2d 1132, 1134 (Ill. App. Ct. 1982) (applying Rule 41(b)); *Dasha v. Maine Med. Ctr.*, No. 93-3856-G, 1996 WL 365995, at *2-3 (Mass. Super. Ct. June 25, 1996) (applying Rule 41(b)); *see also Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1333 (10th Cir. 1988) (applying federal law because issue "analogous" to that covered by Rule 13(a)).

Even in cases that do *not* involve a controlling Federal Rule, courts have clarified that federal and not state law would govern diversity judgments *were* such a Rule on point. *See Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 42 n.3

(2d Cir. 1986) (Newman, J.) (specifying that res judicata questions covered by Federal Rules of Civil Procedure are controlled by federal law); *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 n.1 (2d Cir. 1995) (same); *Answering Serv., Inc. v. Egan*, 728 F.2d 1500, 1506 (D.C. Cir. 1984) (Federal Rules presumptively applicable where interpreted to cover issue in dispute); *see also id.* at 1507 (Scalia, J., concurring in result).[6]

In short, contrary to petitioner's suggestion, Pet. 13, there is *no* court in which it appears that this case would have been decided differently. Every court that has addressed the issue has held that federal law determines the preclusive effect of a federal diversity judgment where a Federal Rule of Civil Procedure speaks directly to the res judicata question in dispute. The lesson of *Hanna* is clear, *see supra* at 9-11, and the commentators – the same ones cited by petitioner – treat this as a straightforward and settled matter. Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 763 (1976) ("To the extent . . . that the Federal Rules of Civil Procedure do speak about the preclusive effect of federal adjudications, they speak authoritatively . . . . They have been given that effect by state and federal courts alike."); Erichson, *supra*, at 1006 (under *Hanna*, Federal Rule trumps state res judicata law); Lilly, *supra*, at 320-21 (where Federal Rule speaks to res judicata issue, Rule is uniformly enforceable); Restatement (Second) of Judgments § 87, at 317 (1982) (Federal Rule governs so long as valid exercise of rulemaking author-

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[6] In *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043-44 (8th Cir. 1997), the court appears to have applied state law to determine the preclusive effect of a federal diversity court dismissal on limitations grounds, reasoning that res judicata issues are "substantive" for *Erie* purposes. The court did not, however, recognize that Federal Rule 41(b) addresses this issue, so it had no opportunity to apply the *Hanna* rule that issues validly regulated by the Federal Rules are not subject to the traditional *Erie* inquiry and are controlled by federal law. *See supra* at 9.

ity).

Semtek generates its purported "conflict" only by relying on cases that present a very different question. If there is any "confusion" in this area, Pet. 9, it arises not in cases like this one, but only when no Federal Rule of Civil Procedure covers the res judicata issue in dispute, so that the question is whether state law or federal *common law* applies to a federal diversity judgment. It is only in this distinct class of cases – cases involving non-Rules issues such as mutuality and privity – that courts could conceivably be thought obliged to look to state res judicata law that is "substantive" under the traditional *Erie* inquiry. *See supra* at 8-10; Lilly, *supra*, at 322; *Semler v. Psychiatric Institute*, 575 F.2d 922 (D.C. Cir. 1978) (applying state res judicata law, in absence of Rule, under *Erie*). And it is only to this class of cases that *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), might be thought to apply. *See supra* at 10; 18 Wright & Miller § 4472, at 732. Petitioner has conflated two different sets of cases controlled by different legal principles. *See* Lilly, *supra*, at 320-21 (distinguishing cases involving Federal Rules from those involving federal common law, and describing latter as raising difficult questions); Erichson, *supra*, at 1006-07 (distinguishing cases).

Because the set of cases in which no Federal Rule controls raises a question very different from that presented here, this case cannot be a vehicle for resolving any confusion that lingers in non-Rules cases.[7] Where a Federal Rule

[7] Even in cases in which no Federal Rule controls, it is worth noting, there is considerably less disagreement on the choice-of-law question than petitioner suggests. In fact, the clear majority rule is that federal law governs the effect of federal diversity judgments as a general matter, without regard to the existence of a relevant Federal Rule. *See, e.g., Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 962 (3d Cir. 1991) (majority of circuits apply federal law); *Havoco of Am. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303, 307 (7th Cir. 1995) (same). Moreover, the trend is in the direction of federal law, with circuits that had once applied state law increasingly disposed toward federal law. *See Lubrizol*, 929 F.2d at 962-63 (declining to resolve issue, but noting that prior cases applying state law did not address question and may have been superseded by *Hanna v. Plumer*); *Gelb*, 798 F.2d at 42 n.3 (suggesting that older cases applying state law have been "eroded" by more recent developments). Petitioner avoids this conclusion only by listing as undecided circuits that have in fact given strong indications that they have or will join the majority of courts applying federal law. *See Havoco*, 58 F.3d at 307 ("We apply, as do the majority of the circuits, federal principles of preclusion."); *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 373 (2d Cir. 1992) ("we have suggested that 'federal law should determine the preclusive effect of a federal judgment,' and several district courts have taken this course . . . [but] the outcome in this case does not require us to decide the question" (citations omitted)); *In re Kaplan*, 143 F.3d 807, 815-16 & n.15 (3d Cir. 1998) (applying federal law to diversity judgment in subsequent bankruptcy action, and finding support in "rationale advanced by the majority of circuits in holding that federal law governs the preclusive effect of a diversity judgment in a subsequent diversity suit").

speaks to the res judicata effect of a federal diversity judgment, as Rule 41(b) does here, then it is clear under *Hanna* that the Federal Rule governs. There is no disagreement among the lower courts on this point, and the commentators confirm their judgment. On the issue actually presented by this case, there is simply no need for any further guidance from this Court.

C. Federal Rule of Civil Procedure 41(b) Is a Valid Exercise of Congress' Rulemaking Authority and Controls the Preclusive Effect of a Dismissal on Statute of Limitations Grounds.

It remains only to clarify that Federal Rule of Civil Procedure 41(b) does, in fact, "control the issue" in this case, triggering the *Hanna* standard and the case law described above. *See Burlington Northern*, 480 U.S. at 5. First, there

is no question but that Rule 41(b) represents a "valid exercise of Congress' rulemaking authority" under the Constitution, delegated to the Supreme Court in the Rules Enabling Act. *Id.* As this Court has explained, any challenge to the validity of a Federal Rule of Civil Procedure "has a large hurdle to get over." *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 552 (1991) (sustaining Rule 11). "[O]nly if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions" can a Federal Rule be deemed invalid. *Id.* (quoting *Hanna*, 380 U.S. at 471). No Federal Rule has ever been held invalid under this standard, *see* 19 Wright & Miller § 4504, at 48, and no court has even suggested that Federal Rule 41(b) might exceed the scope of the Rules Enabling Act.

Second, it is clear that Rule 41(b) speaks directly to the disputed issue in this case. The res judicata question here is the preclusive effect to be accorded a dismissal on statute of limitations grounds. By its plain terms, Federal Rule 41(b) covers this issue, and petitioner can cite no court that has held otherwise.

The terms of Rule 41(b) are perfectly clear: "Unless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits." A dismissal that falls under one of the three enumerated exceptions precludes only relitigation of the same issue – jurisdiction, venue, or joinder – in a subsequent action. But any other dismissal is "on the merits" unless otherwise expressly provided, so that it has claim preclusive and not merely issue preclusive effect. Statute of limitations dismissals do not fall within any of the Rule's listed exceptions. Nor did the rendering district court in this case specify something less than claim preclusive effect; on the contrary, Judge Collins held expressly that

her limitations dismissal was "on the merits" and "with prejudice." Pet. App. 58a-59a. The Maryland court properly construed the "plain language" of Rule 41(b) to cover the issue here and dictate that the statute of limitations dismissal be accorded res judicata effect. Pet. App. 8a (quoting Maryland trial court).

There is no disagreement in the courts on this question. Instead, there is a long line of cases reaching the same conclusion as the Maryland court below: that limitations dismissals are "on the merits" and claim preclusive under the terms of Federal Rule 41(b). *See* Pet. App. at 23a-25a (citing cases); *see also, e.g., Shoup*, 872 F.2d at 1180 (citing additional cases); *PRC Harris*, 700 F.2d at 896-97; *Andes*, 897 S.W.2d at 22-23 (citing additional cases). Petitioner cites no case law to the contrary, and relegates the issue to a footnote in its brief.[8] On this point, the law is settled: Rule 41(b)

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[8] In its footnote, Semtek does refer to *Reinke v. Boden*, 45 F.3d 166, 171 (7th Cir. 1995), in which the court in dicta recognized some academic criticism of the uniform case law applying Rule 41(b) to statute of limitations dismissals. Pet. 28-29 n.22. Both *Reinke* and petitioner rely principally on Wright & Miller, which suggests that Rule 41(b) "need only mean" that dismissal on statute of limitations grounds precludes relitigation of the same issue. 18 Wright & Miller § 4441, at 373. But that is plainly inconsistent with the text of the Rule, which specifically enumerates those dismissals to be accorded issue rather than claim preclusive effect, and does not include limitations dismissals in that category. *Supra* at 16-17. The real focus of the Wright & Miller critique seems to be not court interpretation of Rule 41(b), but the substantive policy decision of the Advisory Committee to give statute of limitations dismissals res judicata effect under the Rule. 18 Wright & Miller § 4441, at 372-73 (statute of limitations issues are "too important" to be resolved by reference to Rule 41(b)). Even if that criticism were warranted – and Lockheed does not believe that it is – the language of the Rule is clear, and petitioner's policy disagreement with the Rule is not, of course, grounds for granting certiorari.

"controls" the preclusive effect of a statute of limitations dismissal for purposes of *Hanna* and *Burlington Northern*, rendering *Erie* and state preclusion law inapplicable.

II. THE CALIFORNIA FEDERAL DISTRICT COURT DECISION TO DISMISS SEMTEK'S CLAIM "ON THE MERITS" IS NOT SUBJECT TO COLLATERAL ATTACK IN THE MARYLAND COURTS.

The Maryland appeals court rejected Semtek's argument not only because it is erroneous, but also because it amounts to an impermissible collateral attack on the judgment of the California federal district court. Pet. App. 31a-32a. The Maryland court was right on both counts. Under petitioner's theory, Judge Collins of the federal district court should have measured the effect of her statute of limitations dismissal by looking to California res judicata law, which does not treat limitations dismissals as judgments on the merits with claim preclusive effect. Instead, Judge Collins determined that her statute of limitations dismissal was "on the merits," consistent not with California law but with Federal Rule 41(b). As decisions of this Court make clear, the avenue for challenging that judgment was a motion addressed to Judge Collins, an appeal to the Ninth Circuit and a petition for certiorari in that case – and not a collateral attack in separate litigation in Maryland.

Federal Rule 41(b) departs from traditional res judicata practice in one respect important to this case. Most res judicata issues can be litigated only in the second, recognizing court, because that is where they arise for the first time. Privity is a good example: by definition, whether a party sought to be estopped is in "privity" with a party to prior litigation is a question that cannot be asked or answered until subsequent litigation is initiated. Thus, the initial decision naturally does not speak to the issue. The preclusive effect of a dismissal under Rule 41(b) is different. Under Rule 41(b), it is the *rendering* court that has the authority to determine the preclusive effect of its own statute of limitations

dismissal (as well as all other dismissals not specifically excepted from the scope of the Rule). This means that litigants have the opportunity to contest the preclusive effect of a limitations dismissal before the rendering court itself and, if unsuccessful, to appeal the issue in those proceedings. Having had that opportunity already, they are precluded from raising the same issue in subsequent proceedings by way of collateral attack.

The Supreme Court addressed just this issue in *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939). Prior litigation in *Treinies* had produced two competing state court judgments: a Washington state court decision awarding stock to one claimant, and then an Idaho court decree distributing the same stock to the other claimant. This Court held that the Idaho judgment was entitled to res judicata effect in a subsequent federal interpleader action, despite the existence of the Washington ruling. *Id.* at 76-78. The rendering Idaho court had itself decided the res judicata question at issue, the Court reasoned, when it held that the Washington court lacked jurisdiction to consider the matter. "If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings." *Id.* at 77. The decision of the rendering court, having effectively decided the res judicata issue before the recognizing court, was "unassailable collaterally" in the subsequent proceeding. *Id.* at 78. *See also Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931) (where rendering court itself decides res judicata issue, with right to appeal in that proceeding, party is precluded from litigating same issue collaterally in recognizing court).

The same rule governs here. The rendering California court itself resolved the contested res judicata issue in this case when it deemed its limitations dismissal "on the merits," consistent with Rule 41(b). Semtek's opportunity to challenge that decision came in the California proceedings, and in the California proceedings alone. *See Cemer v. Mara-*

thon Oil Co., 583 F.2d 830, 832 n.1 (6th Cir. 1978) (whether rendering federal diversity court's dismissal properly covered by Rule 41(b) must be raised on direct appeal from that dismissal and not collaterally in recognizing court); *Nasser v. Isthmian Lines*, 331 F.2d 124, 128 (2d Cir. 1964) (under Rule 41(b), "questions relating to the propriety of [an] earlier dismissal which clearly could have been litigated in that action if raised in a proper and timely manner are . . . foreclosed" in recognizing court); *Kudaroski v. Hellmuth*, No. 79-2489-C, 1981 U.S. Dist. LEXIS 9476, at *4 n.2 (D. Mass. Mar. 16, 1981) (propriety of dismissal under Rule 41(b) must be challenged on direct appeal).

Indeed, Semtek availed itself of its opportunity to challenge the district court decision – though not until its Maryland action was dismissed by the trial court on res judicata grounds – when it sought to have the ruling modified to specify that the judgment was not "on the merits." Pet. App. 11a-12a. In its motion to the district court, Semtek argued expressly that the court was required to apply *California* res judicata law to its dismissal: "this . . . court sitting in diversity must give its own judgment the same scope and effect as if it had been entered by a California state court subject to California res judicata law." Memorandum in Support of Motion to Amend Judgment (filed Oct. 21, 1998) at 2. Judge Collins denied Semtek's motion, relying in part on *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894 (2d Cir. 1983), one of the long line of cases applying Rule 41(b) rather than state law to measure the preclusive effect of a diversity court's dismissal on limitations grounds. Ruling on Plaintiff's Request for Judicial Notice Re: Motion to Amend Judgment (In Chambers) (Nov. 4, 1998); *see supra* at 12 (discussing *PRC Harris*).

Petitioner did not raise any issue regarding the preclusive effect of the dismissal in its appeal to the Ninth Circuit, and the district court decision was upheld in all respects. Pet. App. 3a. Semtek did not petition for certiorari. Semtek's

"right to review" any purported error as to the limitations dismissal ended with the California proceedings, *see Treinies*, 308 U.S. at 77, and the Maryland court properly rejected Semtek's collateral attack on the district court order. Pet. App. 31a-32a.[9]

The bar on collateral attacks does not mean, of course, that this Court will be precluded in future cases from considering whether Federal Rule 41(b) governs the res judicata effect of a federal diversity court's dismissal on statute of limitation grounds. For the reasons discussed in Part I of this brief, this is not a question with which the Court need concern itself. But if the Court did want to reach the issue, it could do so simply by granting certiorari in a case in which appeal is properly taken from the *rendering* court's dismissal "on the merits" under Rule 41(b). Certiorari from the *California* proceedings, that is, could have properly presented the Rule 41(b) issue, had the issue been preserved; certiorari from the *Maryland* proceedings would not.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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[9] Petitioner may argue, as it did below, that the California district court did not intend to resolve the res judicata issue with its dismissal "on the merits," relying on language used by Judge Collins months later when she denied Lockheed's request that she enjoin the Maryland litigation. The Maryland court properly rejected that argument. *See* Pet. App. 9a-11a. Judge Collins herself, the court noted, warned that her discussion of her prior order was "dicta" without even "persuasive authority." *Id.* at 10a. Judge Collins subsequently denied Semtek's request that she amend the order to reflect that her dismissal was *not* on the merits, with full knowledge that her dismissal had been given preclusive effect in the Maryland litigation. *Id.* at 11a. Especially in light of these circumstances, the court held, the meaning of the original dismissal "on the merits" must be located in the plain terms of that order itself. *Id.* at 10a-11a.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,

Petitioner,

v.

LOCKHEED MARTIN CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF SPECIAL APPEALS OF MARYLAND

REPLY TO BRIEF IN OPPOSITION

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36 pp

TABLE OF CONTENTS

1. Semtek's first question, on whether this Court's holding in *Dupasseur* is still good law, is framed at the proper level of generality and is squarely presented by this case 1

2. Lockheed's argument below, repeated in this Court, that *Dupasseur* is no longer good law because of the enactment of the Federal Rules of Civil Procedure is appropriate only for the merits stage 6

3. Lockheed's argument that Semtek is making a "collateral attack" on the California federal court judgment is without basis, as the California federal court itself held 9

CONCLUSION 11

TABLE OF AUTHORITIES

CASES: PAGE:

Andes v. Paden, Welch, Martin & Albano, P.C., 897 S.W.2d 19 (Mo. App. 1995) 4
Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978) 4
Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1874) ... *passim*
Embry v. Palmer, 107 U.S. 3 (1883) 7
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 8, 9
Hancock National Bank v. Farnum, 176 U.S. 640 (1900) 7
Hanna v. Plumer, 380 U.S. 460 (1965) 7
Hart v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468 (11th Cir. 1986) 4
Hillary v. Trans World Airlines, 123 F.3d 1041 (8th Cir. 1997) .. 5
Kent County Bd. of Educ. v. Bilbrough, 309 Md. 487 (1987) 3
Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) 3
Knights of Pythias v. Meyer, 265 U.S. 30 (1924) 7
Metcalf v. City of Watertown, 153 U.S. 671 (1894) 7
Murphy v. Klein Tools, Inc., 935 F.2d 1127 (10th Cir. 4
NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990) 4
Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329 (10th Cir. 1988) 4
PRC Harris, Inc. v. Boeing Co., 700 F.2d 894 (2d Cir.) 4
Shoup v. Bell & Howell Co., 872 F.2d 1178 (4th Cir. 1989) 4
Stoll v. Gottlieb, 305 U.S. 165 (1938) 7

STATUTES, RULES, AND SCHOLARLY MATERIALS:

Conformity Act of 1872, ch. 255, 17 Stat. 196 (repealed 1948) .. 7
Fed. R. Civ. P. 41(b) ..... *passim*
Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733 (1986) 8
Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L. J. 289 (1993) 8
Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 Colum. L. Rev. 1505 (1985) 8
Allan R. Stein, Erie *and Court Access*, 100 Yale L.J. 1935 (1991) 8
18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* (1981) 8

REPLY TO BRIEF IN OPPOSITION

Lockheed advances two principal reasons for denying the petition. First, Lockheed argues that the primary question presented by Semtek, regarding the status of this Court's holding in *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874), is framed at too high a level of generality given the nature of this case. Opp. at 6-7, 11-15. But the threshhold issue of whether federal or state law defines the res judicata effect of the judgment of a federal court exercising diversity jurisdiction is posed here just as Lockheed posed it below, as the courts below posed it, and as the decisions of other courts cited by Lockheed have posed it. It is plainly an important question which should be definitively settled through a grant of certiorari in this case.

Second, Lockheed argues that, in any event, the first question is easily resolved on the merits against Semtek. Opp. at 8-11. In particular, here Lockheed repeats its argument made below that the *Dupasseur* holding was predicated on the Conformity Act of 1872, ch. 255, 17 Stat. 196 (repealed 1948), and thus was swept away by enactment of the Federal Rules of Civil Procedure in 1938. This merits argument is flawed but, more importantly, it is a *merits* argument, not a reason for denying certiorari. *Dupasseur* and is progeny are square holdings of this Court that are contrary to the judgment below. Even if this Court were inclined to endorse Lockheed's argument and the approach taken below, it should grant certiorari rather than stand by and permit the lower courts to simply ignore this Court's precedents.

1. Semtek's first question, on whether this Court's holding in *Dupasseur* is still good law, is framed at the proper level of generality and is squarely presented by this case

Lockheed argues that Semtek has not "properly identified" the issue in this case, which it asserts involves simply the proper "application of a Federal Rule of Civil Procedure — Rule 41(b), governing the effect of dismissals — to a federal diversity judgment." Opp. at 6. According to Lockheed, the first question presented, on whether this Court's holding in *Dupasseur* remains

good law, is defined at too high a level of generality. That question, Lockheed argues, is one concerning "general res judicata principles" that supposedly is pertinent only "in the absence of a relevant Federal Rule of Civil Procedure," and thus is "entirely different from the one presented here." Opp. at 7. By contrast, Lockheed argues, here one must skip over the general issue of federal or state law, and consider only Rule 41(b), which "speaks directly to the res judicata issue in dispute." *Id.*

It is Lockheed that is artificially recasting the core issue, not Semtek. The parties have been in agreement from the start of this case that the threshhold issue on Lockheed's motion to dismiss is whether the res judicata impact of the California federal court judgment is generally governed by federal law, or instead by state law. This is the very issue that appears as Semtek's first question presented. It was also the threshhold issue posed in Lockheed's oral argument to the trial court, which is reproduced in its entirety in the Supplemental Appendix ("SA") bound with this reply. At the outset of its oral argument, Lockheed framed the res judicata analysis as involving two "discrete questions," as follows (SA at 3a):

> The first question is to what law does this court look to determine what the effect of that prior judgment is? And the second question is what does that law tell this court is the effect of that prior judgment?

As to the relative importance of the two questions, Lockheed agreed with the trial court's assessment that the issue is "really determined — the issue is determined by the ruling on whether federal law applies, or does not apply." SA at 8a. In addressing this threshhold issue, Lockheed argued that general principles of federal law control with respect to res judicata, and made no suggestion that Fed. R. Civ. P. 41(b) somehow directly resolves the case on narrower grounds. For example, Lockheed relied on previous Maryland authority generally holding that "Federal law determines the effects under the rules of *res judicata* of the judgement of a federal court," and on a Fourth Circuit case holding "at the outset that federal, not state, law determines the preclusive effect of a prior federal judgment." SA at 4a. Only

after advancing a threshhold argument that federal law generally controls the res judicata effect of a diversity judgment did Lockheed move on to "the second issue, which is what does federal law tell you?" SA at 7a.[1]

The Maryland appellate court below decided the two issues exactly as Lockheed framed them from the start. It first decided the threshhold issue of federal or state law holding, based on such cases as *Kent County Bd. of Educ. v. Bilbrough*, 308 Md. 487, 494 (1987), that it "is well settled that it is federal law that determines the preclusive effect of a federal judgment." Pet. App. 7a. Only after resolving this issue did the appellate court review what the trial court identified as "[t]he applicable federal law" — namely, Rule 41(b). Pet. App. 8a.

The same is true of the res judicata cases cited by Lockheed in support of its assertion that, in every res judicata case cited by Semtek where "a controlling Federal Rule of Civil Procedure governs" the particular res judicata issue at hand (whatever that means), the courts have resolved the case based on that Rule alone, without consideration of the threshhold issue of federal or state law. Opp. at 11-12. Lockheed's reading of these decisions is wrong. Like the appellate decision below, these decisions (with just one exception) deal both with the threshhold issue of source of law and, separately, with the Federal Rule of Civil Procedure that had been identified as arguably applicable.[2] They

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[1] At this juncture Lockheed introduced its argument that the federal law rule defining the res judicata effect of the California federal court judgment is Rule 41(b). SA at 7a-8a. It was explicit in its view that an analysis of Rule 41(b) comes into play only after an initial threshhold decision that federal law applies — the exact opposite of what it is presently arguing in this Court. *See* SA at 12a (indicating that Rule 41(b) becomes relevant "once you get to federal law, once you decide, if you do, that you should be guided by federal law in determining the res judicata effect of Judge Collins's judgement").

[2] *See, e.g. Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962) (explicitly deciding and rejecting, separate from Rule 41(b) analysis, plaintiff's contention "that California and not federal law controls" res judicata effect); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989) (noting "at the outset that federal, not state, law" governs res judicata

do not disprove the logic of the two-step analysis used by Lockheed below, and replicated by Semtek in the petition.

Further, on this point Lockheed essentially ignores the cases cited in the petition from the three federal circuits, and the numerous states, that still adhere to this Court's *Dupasseur* holding that the res judicata effect of a federal court diversity judgment is governed by state law. Lockheed pays attention only to those jurisdictions that have *already* given some indication that such res judicata issues are to be treated as matters of federal law — a stance that then logically leads such courts to treat an arguably applicable federal Rule as quite important.

Obviously, a test of Lockheed's theory that Rule 41(b), standing alone, renders *Dupasseur* irrelevant is only possible if this theory holds in courts that *adhere* to the *Dupasseur* holding and decline any general use of federal law in measuring the res judicata effect of a federal diversity judgment. But Lockheed's theory fails in such courts. For example, the Eighth Circuit adheres tightly to the *Dupasseur* approach and has repeatedly rejected any use of federal law to determine the res judicata effect of a federal court diversity judgment. See Pet. at 19 & note 14.

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effect, before any consideration of Rule 41(b)); *Andes v. Paden, Welch, Martin & Albano P.C.*, 897 S.W.2d 19, 21 (Mo. App. 1995) (deciding that federal law of res judicata applies, before considering Rule 41(b)); *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 n.1 (2d Cir. 1983) (deciding separately from Rule 41(b) analysis that federal law of res judicata applies); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 831 (6th Cir. 1978) (holding that federal law of res judicata applies, before considering Rule 41(b)); *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir. 1991) (appearing to rely entirely on Rule 41(b) for result, without consideration of threshhold issue of federal or state law); *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990) (discussing issue of federal or state law separately from analysis of Rule 41(b)); *Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986) (same); *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1332-33 (10th Cir. 1988) (discussing issue of federal or state law separately from Rule 13(a)).

We note that in the first full paragraph of Opp. at 12, Lockheed purports to describe a pattern that "holds through all the cases cited by petitioner," but then discusses three cases never cited by Semtek.

Indeed, in *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043-44 (8th Cir. 1997) (cited in Pet. at 19 n.14), the Eighth Circuit refused to follow the lead of other circuits that had applied federal law to measure the res judicata effect of an earlier statute-of-limitations dismissal in a diversity case.

This is just what one would expect from the Eighth Circuit: a holding directly contrary to the holding of the Maryland courts below. Yet in its zeal to deny that any conflict exists, Lockheed belittles the Eighth Circuit's competence by asserting that the Eighth Circuit "did not . . . recognize that Federal Rule 41(b) addresses this issue, so it had no opportunity" to realize that Rule 41(b) dictates a uniform federal res judicata rule in this context. Opp. at 13 n.6. On examination, this theory falls apart: the Eighth Circuit had every opportunity to adopt Lockheed's Rule 41(b) approach, for it was specifically argued by the appellee (the pertinent excerpts of the brief are reproduced in SA at 16a-20a). Citing Rule 41(b) and several decisions from other circuits relying on Rule 41(b) for a federal res judicata rule governing statute-of-limitations dismissals, the appellee there argued that "the Federal Rules appear to dictate the preclusive scope of a federal judgment." SA at 18a-20a. The Eighth Circuit squarely rejected this argument, and instead measured the res judicata effect solely under state law, consistent with its adherence to this Court's *Dupasseur* line of authority.

In sum, not only is the first and main question presented framed at an *appropriate* level of generality with respect to the circumstances of this case, it is also phrased in *exactly the same way* that Lockheed framed it from the beginning of this case until its brief opposing certiorari. Lockheed makes no real effort to deny that this question, as framed, is an important one that has been the subject of much confusion in the lower courts for decades, and that the question is one that ought to be resolved at the earliest opportunity.[3] Nor does Lockheed deny that the first

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[3] Lockheed's only effort at a denial lies in its observation that, among the federal circuits, "the clear majority rule is that federal law governs the effect of federal diversity judgments as a general matter, without regard to the

question is decisive of Lockheed's motion to dismiss: if this Court grants review of the first question and answers it yes, reaffirming in full *Dupasseur* and its progeny, then Lockheed's motion will be denied, as California law will then govern the preclusive effect of the earlier judgment, under which Semtek wins.[4] A grant of certiorari on the first question is thus warranted.

2. Lockheed's argument below, repeated in this Court, that *Dupasseur* is no longer good law because of the enactment of the Federal Rules of Civil Procedure is appropriate only for the merits stage

Lockheed also presents a merits argument with respect to the first question, centering on the enactment of the Federal Rules of Civil Procedure in 1938. It provides no reason to deny certiorari.

In its appellate brief below, Lockheed answered Semtek's *Dupasseur* argument by asserting that it is "no longer good law." SA at 13a-14a. Even though the *Dupasseur* line of cases has never been overruled or explicitly modified by this Court, Lockheed argued that it is "no longer valid today" because it was supposedly founded upon the Conformity Act of 1872, which was repealed in conjunction with the enactment of the Federal Rules of Civil Procedure. SA at 14a.

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existence of a relevant Federal Rule." Opp. at 14 n.7. The petition showed as much, *see* Pet. at 14-23, but Lockheed ignores the salient point. That most federal circuits have on their own departed from the *Dupasseur* line of cases, even though *Dupasseur* has never been overruled or explicitly modified by this Court, cuts for, not against, granting review — to ensure that this Court's precedents are respected unless and until changed. *See* Pet. at 10-13. Further, Lockheed ignores the fact that the clear majority rule among the states is to adhere to *Dupasseur*, *see* Pet. at 23-24, so that, even if every federal circuit were to abandon *Dupasseur*, there would remain enormous conflict and confusion among the lower courts, and there would be even greater rewards for forum shopping between federal and state courts than already exist.

[4] As Lockheed has never disputed, and does not dispute here, if the res judicata effect of the California federal court statute-of-limitations dismissal is measured by California law, then that dismissal does not preclude suit in Maryland. *See* Pet. at 4-5. Nor has Lockheed moved to dismiss on the basis that the suit is time-barred under Maryland law. *See* Pet. at 4 n.3; Opp. at 4.

In opposing certiorari, Lockheed again focuses on the enactment of the Federal Rules of Civil Procedure as an event establishing that the *Dupasseur* liné of cases is no longer good law. It argues that, at least where a specific Rule pertains to the res judicata issue at hand, the analytic structure of *Hanna v. Plumer*, 380 U.S. 460 (1965), not the rule of *Dupasseur*, should control. Opp. at 8-11. This is an argument on the merits that should be reserved for the merits stage; it is not a reason to deny certiorari. If Lockheed were correct that the rationale for the *Dupasseur* line of cases died with the Conformity Act, and that the *Dupasseur* rule is incompatible with the Federal Rules of Civil Procedure, then this Court should grant certiorari and so hold. It would thus end the current situation in which some lower courts still adhere to *Dupasseur* while others deem *Dupasseur* to have been implicitly overruled by subsequent events, so that the meaning of any given federal court diversity judgment depends on the accident of the court in which it is later tested.

We hasten to add that persuasive answers certainly exist to meet Lockheed's merits argument centered on the enactment of the Federal Rules of Civil Procedure. First, not once in *Dupasseur* or in this Court's decisions elaborating and applying *Dupasseur* did this Court mention the Conformity Act of 1872. It is difficult to discern in these decisions any basis for concluding that the rule the Court was articulating — that diversity judgments have the same res judicata effect they would have if rendered by a state court in the forum state — derived from the fact that, under the Conformity Act, federal court and state court procedures happened to be substantially similar. The only authorities cited by this Court in these cases were the constitutional and statutory provisions on full faith and credit, and the general jurisdictional statutes. *See, e.g., Embry v. Palmer*, 107 U.S. 3, 9-10 (1883); *Metcalf v. Watertown*, 153 U.S. 671, 676 (1894); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 644-45 (1900); *Knights of Pythias v. Meyer*, 265 U.S. 30, 33 (1924); *Stoll v. Gottlieb*, 305 U.S. 165, 167, 170 (1938).

Second, and consistent with the authority relied on by this Court in its *Dupasseur* line of cases, there is ample scholarly

analysis supporting the view that the issue of what the res judicata effect of a federal court diversity judgment should be — both then and now — is not a question bound up in the particular procedures that a federal court uses in processing cases, but is instead an issue lying outside the bounds of procedure. *See* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 741-55, 772-76, 781-83 (1986); Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L. J. 289, 320-21 (1993); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 985-89 (1998); Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 Colum. L. Rev. 1505, 1513-18 (1985).

Third, Lockheed's theory that the enactment of the Rules produced a sea change that washed away the *Dupasseur* line of cases is inconsistent with the fact that, on at least three occasions since enactment of the Rules, this Court has taken care to articulate a rule for the res judicata effect of federal court judgments so as to avoid displacing *Dupasseur*. *See* Pet. at 12. If it were so obvious that enactment of the Rules itself displaced the previous framework for analyzing the res judicata effect of diversity judgments, presumably in these cases this Court would simply have announced a flat rule governing all judgments, rather than exhibiting such care to leave *Dupasseur* undisturbed.

Fourth and finally, with respect to Lockheed's construction of Fed. R. Civ. P. 41(b) in particular, the scope of the claim preclusive effect of a statute-of-limitations dismissal of an action in another jurisdiction is not determined by the words "on the merits" in Rule 41(b) but rather by considerations of federalism and full faith and credit. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4441, at 372-73 (1981), and the authorities cited in Pet. at 28-29 n.22; *see also* Allan R. Stein, Erie *and Court Access*, 100 Yale L.J. 1935, 1937-39 (1991). The question, we suggest, is not one of issue versus claim preclusion, as Lockheed argues, Opp. at 17 n.8, but a matter of the proper *scope* of claim preclusion — in particular, its impact on a subsequent action in another forum. Thus the case is very much like a case raising a question of the

applicability of the mutuality rule when a dismissal has occurred "on the merits." (Lockheed concedes that in cases involving "issues such as mutuality," Opp. at 14, the question of mutuality vel non is not answered by Rule 41(b).)

In other words, a federal court statute-of-limitations dismissal in a diversity case made "on the merits," or "with prejudice," is entitled to *whatever* preclusive effect it has under the law governing that effect. *See* Pet. App. 64a-70a (analysis to that effect of the California federal district court that issued the judgment at issue in this case). If the relevant law (state law, under *Dupasseur*, or else federal law, if *Dupasseur* is overruled or modified) follows the majority approach, *see* Pet. at 29 & n.23, the dismissal merely precludes any further claim within the forum state. Under the minority approach, *see* Pet. at 29-30, such a dismissal will also bar a claim in any other jurisdiction. Regardless of which approach is taken, the scope of the preclusive effect of the dismissal is not dictated by Rule 41(b).[5]

3. Lockheed's argument that Semtek is making a "collateral attack" on the California federal court judgment is without basis, as the California federal court itself held

In an effort to suggest a final obstacle to review, Lockheed closes its opposition with a confusing assertion that the petition somehow advances a "collateral attack" on the California federal court judgment. Opp. at 18-21. In so doing, Lockheed ignores the narrow analysis of the Maryland appellate court below with

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[5] In a point related to its Federal Rules of Civil Procedure theory, Lockheed erects and then attacks a straw man in claiming that Semtek's "argument for California law" rests on *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Opp. at 8-9. To the contrary, Semtek's argument for applying California law to determine the res judicata effect of the California federal court's statute-of-limitations dismissal rests squarely on the *Dupasseur* case, decided 64 years before *Erie*. *See* Pet. at 10-13. *Erie* is not even cited in the petition. Of course, *Erie* principles may well be relevant in fleshing out the appropriate content of a federal common law rule for the res judicata effect of a statute-of-limitations dismissal in a diversity case, if this Court were to overrule or modify *Dupasseur*. *See* Pet. at 26-28. But that is another matter altogether.

respect to the one argument previously made by Semtek (not advanced here) that may have involved a collateral attack. Lockheed also ignores its past briefing on this point.

First, Lockheed's entire argument hinges on its imprecise observation that "[t]he Maryland appeals court rejected Semtek's argument . . . because it amounts to an impermissible collateral attack on the judgment of the California federal court." Opp. at 18 (citing Pet. App. 31a-32a). Lockheed neglects to mention that the court rejected only one of Semtek's arguments on that basis — not Semtek's *Dupasseur* argument, the only one being pursued in this case, but Semtek's alternative *Erie* argument concerning the form of the judgment entered by the California federal court, an argument that Semtek is definitely not pursuing here.[6] Because Semtek is not pursuing this argument at all, it can hardly be accused of making a "collateral attack" on the California federal court judgment based on this argument.

Second, there is no basis for suggesting that Semtek's remaining argument based on *Dupasseur*, concerning which source of law is used to decide the meaning of the California federal court judgment, involves any sort of "collateral attack" on the judgment. Semtek does not seek any *change* in the judgment; it seeks only a determination of what the judgment *means*. The meaning of that judgment has not previously been determined.[7]

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[6] See note 5, *supra*. As we have pointed out without contradiction, the form of the California federal court judgment, and Semtek's earlier attacks on the form of that judgment, have turned out to be irrelevant to the disposition of this case. *See* Pet. at 4 n.2.

[7] As Lockheed itself observed in its brief below, the very purpose "of this appeal [is] to determine the preclusive effects of a **prior** federal judgment." Brief of Appellee filed Jan. 6, 1999, at 19 n.13. *See also id.* at 29 (noting that the California federal court's "Order denying injunctive relief made it perfectly clear that it has never determined the *res judicata* effect of its prior judgment."); Pet. App. 9a (noting that the California federal court had not determined the preclusive effect of its judgment); Pet App. at 71a & n.17 (California federal court order declining Lockheed's request that it decide preclusive effect, and concluding that the "matter can properly be decided by the appropriate court in Maryland, not by this court").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 31, 2000

TABLE OF SUPPLEMENTAL APPENDICES

SUPPLEMENTAL APPENDIX A
Transcript of oral argument in the Circuit Court for Baltimore County, Maryland, in *Semtek Int'l, Inc. v. Lockheed Martin Corp.*, No. 97183023, April 23, 1998 ..... SA 1a

SUPPLEMENTAL APPENDIX B
Excerpt from Brief of Appellee Lockheed Martin Corporation in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 736 A.2d 1104 (Md. App. 1999), filed January 6, 1999 ..... SA 13a

SUPPLEMENTAL APPENDIX C
Excerpt from Brief of Defendant/Appellee Trans World Airlines, Inc., in *Hillary v. Trans World Airlines*, 123 F.3d 1041 (8th Cir. 1997), filed November 27, 1996 ..... SA 16a

SUPPLEMENTAL APPENDIX A

IN THE CIRCUIT COURT
FOR BALTIMORE CITY

SEMTEK INTERNATIONAL, INC.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	CASE NO.
	*	
LOCKHEED MARTIN CORP., et al.,	*	97183023
	*	
Defendants.	*	
	*	

BALTIMORE, MARYLAND

April 23, 1998

BEFORE:

THE HONORABLE JOSEPH H. H. KAPLAN
ADMINISTRATIVE JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

ANDREW ZEPEDA, ESQUIRE
WALTER LACK, ESQUIRE
THOMAS GERARDI, ESQUIRE

FOR THE DEFENDANT:

FRANCIS BURCH, ESQUIRE
JEFF FROST, ESQUIRE
TONY MEAGER, ESQUIRE

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[2]

PROCEEDINGS

(9:35)

THE COURT: Good morning.

COUNSEL: Good morning, Your Honor.

THE COURT: It's a little bit warm in here. Have a seat. I didn't turn the heat on so that you move quickly. But the City has a system whereby they — on a certain date, the air conditioning goes on, and you can overheat prior to that date. And if on that date it's freezing, you doubly freeze, because they turn the air conditioning on. But anyway, this is Semtek International, Inc. versus Lockheed Martin Corp., case number 97183023 and it's Lockheed Martin's motion. Mr. Burch?

MR. BURCH: Thank you, Judge Kaplan. First of all, I'd like to introduce Jeff Frost who's from Omelbany and Meyers, Los Angeles, who's here at the counsel table with me, as well as my partner, Tony Meager.

THE COURT: Do you absolutely need the podium?

MR. BURCH: Would you prefer that I —

THE COURT: Yeah. Our concern it that the microphone —

MR. BURCH: The microphone won't pick up?

THE COURT: Won't pick up.

MR. BURCH: Rather than use that podium. [3]

MR. BURCH: Your Honor, what I'd like to do is start from the beginning here, and reduced to its simplest terms, what I do not believe is a terribly complicated issue.

What I'd like to do is I'd like to start with the order entered on May 8th, 1997 by Judge Collins in the first lawsuit filed against Lockheed in California by Semtek asserting the claims that have been asserted in this lawsuit pending in this court. Because the issue on this motion is what is the effect of that order? And I think it's important, before we get into complicated jurisprudence, to read the order.

It says it is ordered, adjudged and decreed that Plaintiff Semtek International, Incorporated, take nothing on its complaint in this action, that the action be dismissed in its entirety on the merits and with prejudice, and that this judgment be entered forthwith in favor of Defendants Lockheed Martin and Samuel Orcini.

Now after that order and judgement were entered in the federal courts in California, it's important to note what did happen and what did not happen.

What did happen was Semtek noted and appeal to the ninth circuit. What did not happen was a motion to reconsider or a motion to amend the order. So there is presently filed in the federal court in California that [4] judgement which I have just read the court which is presently on appeal in California. That brings us here. No one —

THE COURT: And the status of that is it's just still on appeal.

MR. BURCH: That's correct. It's —

THE COURT: Has it been argued —

MR. BURCH: I don't believe its been argued. I needn't state the obvious, but I can't resist. If Semtek prevails, the case will proceed in California. If it does not, it will certainly not proceed in California. And the issue is what is the effect of that judgment, final judgement, unamended, without any motion, without any motion to reconsider on this proceeding?

And I suggest to The Court that it raises two questions. They are discrete questions. The first question is to what law does this court look to determine what the effect of that prior judgment is? And the second question is what does that law tell this court is the effect of that prior judgement?

I'd like to take a minute, take each one of these questions. With respect to the question of what law does this court look, I

think the answer is found in the Kent case decided by the Court of Appeals, which says Federal law determines the effects under the rules of *res* [5] *judicata* of the judgement of a federal court. That was a holding in the case, and The Court cites to the restatement of judgements, Section 87.

And as this court knows well, the Maryland court tends to follow the positions of the restatements. It is the rare exception where the Maryland courts do not follow the restatement. But here we have an explicit holding by the highest court in this state that to determine the res judicata effect of a prior federal judgement, this court looks to federal law.

Now what else do we have? Well we happen to have an opinion by the Fourth Circuit Court of Appeals on the very same issue, the [Shoup] case which has been discussed in both briefs. And on page 1179 of the reported federal decision, The Court holds we note at the outset that federal, not state, law determines the preclusive effect of a prior federal judgment including the question of whether that judgement was on the merits.

And the fourth circuit goes on to say notwithstanding the fact that the Plaintiff filed her Maryland lawsuit, as did Semtek, allegedly, within Maryland's three year statute of limitations, that fact does not determine whether an earlier identical action between the parties found to be time barred because it was not filed within Pennsylvania's statute precluded the [6] Plaintiffs from bringing the lawsuit in Maryland.

So we have the Court of Appeals, we have Section 87 of the restatement of judgements, and we have a fourth circuit case, and they all tell this court exactly the same thing, and that is for the court, you look to federal law to answer that question.

Now why do these courts say that? Well I think the [Shoup] case makes it quite clear, it lays it out. This is not some arbitrary irrational rule that is designed to trip people up. It says we have this rule because we want a federal judgement to mean the same thing regardless of who's looking at it, just like the federal courts are required to give effect to a state law judgement, wherever that judgement might be argued.

THE COURT: Mr. Burch?

MR. BURCH: Yes, sir?

THE COURT: Semtek says, however, that it was Lockheed Martin that took the case to the federal court. And they filed in the state court in California. And, therefore — and the state court has never entered a judgement, though in all probability, their judgement would be very similar to the federal court because it was a limitations issue, and two year is two years is two years.

MR. BURCH: And presumably, the courts would reach the same conclusion. [7]

THE COURT: That's right. So they would've made the same ruling.

MR. BURCH: That's correct. Right.

THE COURT: But they didn't.

MR. BURCH: Right.

THE COURT: Clearly, if Semtek had been the one that filed in the California Federal Court, they would be stuck under 41-B, and they wouldn't have been able to proceed in Maryland in the Federal Court in Maryland. But do you think there's any difference because it is you all that took the case to the —

MR. BURCH: Not only do I not think there's any difference, but the fourth, fifth and a number of other circuits don't believe there's any difference. As a matter of fact, in [Shoup], that's exactly what happened. That's exactly what happened.

The first case was filed in Pennsylvania State Court. It was removed to Federal Court. It was the Federal Court that then entered a judgement on the statute of limitations grounds. And the later suit looked to the effect of the first judgement. And on those facts, the Fourth Circuit found federal law is the law that answers that question without regard to why or how the case got there. Because there was federal jurisdiction, the judgement was a valid judgement entered by a federal [8] tribunal, and the issue is what does that judgement mean?

Now [Shoup] and Thompson Trucking, the Fifth Circuit case, are directly on point in that respect, as are two other cases that I'll mention in a minute, two other circuit court cases, the Murphy case, and the — I had it here in my notes, the P.R.C. Harris case.

In every one of those cases, the first case was a diverse — was a case filed in State Court, diversity jurisdiction, removed to Federal Court, judgement based on the statute of limitations. And again, we're not talking about, we're not on to Rule 41 yet. We're just talking about what law do you look to answer the question.

And in all of those cases, they say you look to federal law. And the reason is we don't want to be dissecting federal judgements to say well this judgement's based on a federal statute, this judgement's based on a state claim, this case was originally filed in Federal Court, this case was not originally filed in Federal Court. What these courts say is this is a question of federal power, the integrity of a federal judgement, and they have made the determination that it doesn't matter whether it's a federal question case, a diversity case, and it doesn't matter how federal jurisdiction attached to the matter.

And I will jump ahead, Your Honor. I was going to address the Rule 41 point and then come back and deal **[9]** with Semtek's argument, but it doesn't matter. And the reason why it doesn't matter is because if you say, for whatever reason, and I don't think you do, we're going to give whatever preclusive effect to this judgement a California court would give it, whether you start by saying what would the Federal Court do or what would the State court do, you end up in the same place.

Because the Ninth Circuit in the Constantini case, right on this issue, said you look to California law which, in turn, like Maryland, says you look to federal law. And the Constantini case was followed twice by the Ninth Circuit, reaffirmed, in cases involving the same question in Washington and Oregon. So we've got three times now the Ninth Circuit has said if you look to state law, you look to the part of state law that says what law controls.

So if you were looking to Maryland law, for example, you'd look at the Court of Appeals decision in Kent, and that would say federal law controls. So you have the same result. You are directed to federal law if you look to the Court of Appeals, if you look to the restatement in Section 87, if you look to the [Shoup] case, if you look to Thompson Trucking, if you look to the Ninth Circuit cases, and if you look to the California Supreme Court

cases. **[10]**

Now let me move onto the second issue, which is what does federal law tell you? And again, the place to start is the rule that addresses this question explicitly. It's rule 41-B, and it says unless The Court, in its order for dismissal, otherwise specifies, it's important, in its order otherwise specifies, a dismissal under the subdivision, and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

Now I submit to The Court that we could decide this case without reference to anything else because the plain meaning of those words is this judgement that I've just read to The Court operates as an adjudication on the merits. But we don't have to stop there.

Because if we look at every reported federal decision that construes the meaning of those words in a holding including the [Shoup] case in the Fourth Circuit, they all reach the same conclusion. They all say it means exactly what it says. The plain meaning of those words is it is an adjudication on the merits. And they say that while explicitly recognizing that preclusion acts to bar the action even though the substantive issues have not been tried. And that's on page 1181 of the [Shoup] case.

So the Court of Appeals has its eye wide open. **[11]** They've heard the very same equity arguments that are made by Semtek here. And what they says is we understand that reading Rule 41, as it states, to bar this claim because the prior judgement was an adjudication on the merits, means that the underlying substantive issues were not tried.

Now why do they do that? Why do all of these cases do that? And they're cited all on page 14 of our reply brief. And they're all cited in the [Shoup] case. They do that for two reasons. Number one, The Court says that's what the language says. We don't have the power to start engrafting, essentially, equitable exceptions onto the rule. And that's exactly what the plaintiffs argued in [Shoup]. They said well, a limitations dismissal is sort of like some of these other things that are exempted from the operation of the rule, and

the Fourth Circuit says that's not what the rule says.

THE COURT: Well so they'd be right if — they'd be right if you're wrong on the application of federal law to this.

MR. BURCH: That's correct. If you — some states, although the trend is now moving toward the federal rule, Maryland —

THE COURT: Has not.

MR. BURCH: Has not, that's correct, and a number **[12]** of states have not. And that's where you see distinctions. But they are not dealing they are not construing a federal judgement. They are construing state judgments. And we don't make the rules, obviously. When I say we, this court, as a matter of fact, the fourth circuit really didn't make the rule. Congress and the Supreme Court made the rule, Rule 41. But they go on to talk about the Fourth Circuit.

THE COURT: So it's really determined — the issue is determined by the ruling on whether federal law applies, or does not apply.

MR. BURCH: I believe so, Your Honor. Because I really don't think there's any holding, there's any authority that does what the Plaintiffs would like this court to do.

Now I think it's important to look at the rationale in [Shoup]. [Shoup] said, number one, we have to do this because this is what the rule says. But it goes on to talk about why this makes sense, and why it makes sense even for a diversity judgement in the federal system to work this way. And they say, number one, the Plaintiff picks the forum.

And they are very clear that there are considerations that make selection of one forum riskier in some respects than selection of another forum. And they **[13]** say this is a reality, but the Plaintiffs pick the forum.

Now Lockheed is a Maryland company. It's not like this is a fact that should have been lost on them. We were here. The Maryland state of limitations is three years, and I'm not conceding this claim would be time barred under the Maryland statute. But there's nothing mysterious about this. They chose to file this lawsuit in California, there was federal jurisdiction. A federal court entered a final judgement. And under the [Shoup] case, that

judgement has res judicata effect.

The other things that the [Shoup] case says are this is important because it avoids inconsistent results, or the Defendant having to win twice.

Now this is not an abstract consideration, and it's not just Lockheed to which this rule applies because Defendants had to — we had to hire lawyers in California. There were extensive proceedings in California. We won that case. And under their scenario, we just start all over again in Maryland.

And I might say if they're correct, and this court — if this court were to determine that they were correct, and then decide against them on the statute of limitations, there would be absolutely nothing to prevent them from going to New York, which has a six year statute of limitations, where Lockheed can obviously be found in a **[14]** state court and naming a state defendant, and argue removal and arguing they can start all over again there.

So the Fourth Circuit says that interest is served here. And again, on page 1180 of the [Shoup] case, all of the authorities which hold the same thing are cited, and on page 13 of our reply brief these authorities are cited.

Now there's another very important authority in our brief. It's the Andes case. It's Andes vs. Paden, P-A-D-E-N. It's cited in our reply brief. Why is the Andes case important? It's important because the Andes case is a decision by the Missouri appellate court on exactly the same situation that happened here, case number one filed against the Defendant. This is a little unusual. It's a divorce case.

The husband tapes telephone conversations of the wife, or vice versa. A lawsuit's filed in the state court alleging violations of state law and state torts. After the state lawsuit is filed, a lawsuit is filed in federal court alleging violations of the federal antiwiretap law. That law has a two year statute of limitations. No state claim filed in the federal court action.

Defendant moves to dismiss the federal court action on the ground that the statute has run. Federal **[15]** court enters judgement in that case. Defendant then moves to dismiss the state case on res judicata grounds arguing that that final federal judgment precludes

the prosecution of the state case. And the parallel is striking because you're talking about a state court that's saying what effect do I give that federal judgement.

And what the Missouri appellate court said was you look to federal law, and you look at Rule 41-B, and you look at the cases which construe that rule, and they all say that there is res judicata effect, assuming that the claims asserted in state court could have been brought in the federal action.

So it's even more — it's even a more difficult result for a plaintiff because in that case they didn't file exactly the same lawsuits. They filed a federal claim in a federal court, and the Missouri court followed Rule 41, followed [Shoup], followed Thompson Trucking, followed all of these other circuit and district court cases and said the issue here is the efficacy of a federal judgment. And it is not for us to mess with that, just like we wouldn't want federal courts second guessing a state court on collateral estoppel, or the res judicata effect of a state judgement.

And that's consistent. If you're in federal court, and you are arguing that a prior state judgment **[16]** bars your claim, the federal courts say we don't look at rule 41. We look at the state law. And if the state law says it's okay, we respect that.

THE COURT: What if, after the federal judgement, the state court in California had done exactly the same thing? Would that make any difference?

MR. BURCH: I'm not sure what you mean.

THE COURT: Well forget the 41-B problem.

MR. BURCH: Right.

THE COURT: Let's assume we now had a judgment by the California State court obeying they're two year statute of limitation and dismissing the case, and now we have the Maryland case. What would be the situation with the Maryland case?

MR. BURCH: We would be arguing that The Court should give res judicata effect to that. But, under the current state of the law, I think that would have the better of the argument because both California and Maryland has, insofar as state judgements are concerned, make an analysis of whether the statute is a procedural matter or is part of the right. And in this case, I think there's — we

would be on the short end of that stick, to be perfectly candid with you.

But the federal rule, and the federal cases have explicitly declined to make this distinction between **[17]** whether the judgement, whether the statute of limitations is procedural, that is it affects only the remedy, or whether it is part of the right. The federal courts have confronted that head on.

And as I said before, these cases that I have cited were all cases that were filed in state court, and found their way into federal court by way of removal.

Now with respect to the judgement that was rendered by Judge Collins, if they'd filed this very lawsuit in California under the precedence of the Supreme Court of California, California state court would be required to give it preclusive effect.

So there's nothing untoward about this result, it just represents a difference that attains in some states between the effect that is given to a state judgement versus a federal judgement.

So I suggest to you that the California court, if they filed a second case in state court in California, California Supreme Court says you have to look to Federal law to determine the preclusive effect of that judgement, federal law takes you to Rule 41-B and the cases cited under Rule 41-B, and they lose. So if this court reaches a different result, they, in effect, get a better outcome than they would get if they filed in the same case in the state court in California. **[18]**

And I don't think anybody argues with that. I mean there are two Supreme Court — California Supreme Court cases that say if it's a federal judgement, you look to federal law.

Now what do — what does Semtek say about the Rule 41-B issue? And obviously, I'm sure they're going to have other things to say. But what I hear them saying is the policies that underlie the decision like [Shoup] don't apply here because those courts are basically trying to protect the federal court from vexatious litigation.

And I think there are two problems with that argument. Number one, if you read [Shoup] from front to back, it doesn't say that. The first sections of the [Shoup] holding deals entirely with

what does Rule 41-B say. The second section deals with policies that are served by the rule, and even there, it makes no reference to intra versus inter judicial system disputes.

The second problem with the argument is it amounts to a statement that the federal courts are available for one free advisory opinion. That is not consistent with a desire to promote finality, consistency and to spare defendants not just the expense and inconvenience of defending two lawsuits, but all of the collateral consequences that attach to being a defendant, particularly a lawsuit that alleges conduct which amounts **[19]** to or borders on fraud.

So I think if you get passed the — if you look at the opinions, they simply don't support this argument. And I would just conclude by saying that the only thing they can point to is some dictum in the Ranky case which really demonstrates why courts should follow holdings and not dictum. In Ranky, the issue was what is the preclusive effect of a state judgement, not a federal judgement. So it has absolutely nothing to do with the situation presented here.

And The Court's ruminations in a foot note about whether or not the rule in [Shoup], and Thompson Trucking, and Murphy, and PRC and the other cases say is or is not ill-advised. It is a classic case where a court that has no reason to address the issue does not speak with authority when it comments.

But again, I think the important point is once you get to Rule 41-B, once you get to federal law, once you decide, if you do, that you should be guided by federal law in determining the res judicata effect of Judge Collins's judgement, once you get there, I haven't seen a holding any court that says it doesn't have res judicata effect because it's a diversity opinion, based on diversity, or because the case was originally filed in state court, or because there is no interest of protecting the federal **[20]** court from vexatious litigation. So for those reasons, we would ask The Court to dismiss the case with prejudice. Thank you.

* * * *

SUPPLEMENTAL APPENDIX B

EXCERPT FROM BRIEF OF APPELLEE LOCKHEED MARTIN CORPORATION IN *SEMTEK INT'L INC. V. LOCKHEED MARTIN CORPORATION*, 736 A.2d 1104 (Md. App. 1999), filed January 6, 1999

[25]

Finally, Semtek argues that, in spite of all of the modern authority determining the full faith and credit or *res judicata* effect that must be granted to a prior federal judgment, *Shoup* and even *Constantini* are wrong because the Supreme Court held in 1900 that the full faith and credit doctrine dictates that a judgment of a District Court sitting in diversity must be given the exact same preclusive effect as a state court **[26]** decision from the state where that District Court sits. Thus, Semtek argues, federal preclusion law is inapplicable.

Semtek's argument is based on the following quote from *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640 (1990):

> The fact that this judgment was rendered in a court of the United States, sitting within the State of Kansas, instead of one of the states courts, is immaterial; for . . . it may be conceded, then that the judgments and decrees of the Circuit Court of the United States, sitting in a particular State, in the courts of that State, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority.

176 U.S. at 645. Semtek argues that this statement from *Hancock* is consistent with Rule 41(b), Restatement (Second) of Judgments § 87 and the Maryland Court of Appeals command in *Kent*, provided the Court reads these authorities to only require Maryland courts to look to federal law to determine the preclusive effect of "certain federal court judgments," namely judgments resolving federal questions.

There is no such limitation in Rule 41(b), *Kent* or the Restatement. More importantly, however, the proposition for which Semtek cites *Hancock* is no longer good law. When *Hancock* was decided, almost a hundred years ago, the Supreme Court's statement was correct on two levels: (1) State courts were required to give full faith and credit to federal, as well as state, court judgments; and the (2) the scope of a federal judgment was determined by the law of the state in which it was rendered because the Conformity Act of June 1, 1872, Ch. 255, 17 Stat. 196, required that the rules of practice and procedure of the federal courts be the same as those of the states in which the District Court sat.

Hancock's first point — that state courts must give full faith and credit to federal court judgments — supports Lockheed, not Semtek. As shown above, under federal law, Maryland law, California law and even "Ninth Circuit law," the Federal Court's judgment bars this action. To give that judgment full faith and credit, Judge Kaplan's judgment so holding must be affirmed. **[27]**

Hancock's second holding — that the scope of a federal judgment was to be determined by the law of the state in which it sat — might have supported Semtek's position if the Conformity Act were still in force. But it is not and has not been for over sixty years. The Conformity Act was repealed in 1934 by the Rules Enabling Act, Ch. 651, 48 Stat. 1064, which is now codified at 28 U.S.C. § 2072. *See generally* Degnan, 85 Yale L.J. at 755-59; Charles A. Wright, Law of Federal Courts at 737-38 (5th ed. 1994). Thereafter, the Federal Rules of Civil Procedure, including Rule 41(b) establishing the preclusive effect of federal judgments, were enacted in 1938.

In short, the second part of the Supreme Court's holding in *Hancock*, the part Semtek is attempting to rely on, is no longer valid today and has not been cited by the Supreme Court since the Federal Rules of Civil Procedure were adopted over sixty years ago. *Acme Granite & Tile Co. v. F.D. Rich Co.*, 441 F.2d 1143, 1143 (9th Cir. 1971); Degnan, 85 Yale L.J. at 755-59. After implementation of the Federal Rules, federal practice, in both federal question and diversity cases, came to differ from that of nearly all states. *See Byrd v. Blue Ridge Rural Electric*, 356 U.S.

525, 537 (1958) (explaining in a diversity case that the federal courts are an independent system for administering justice to litigants properly invoking its jurisdiction); Degnan, 85 Yale L.J. at 755-59. These Rules, including Rule 41(b), displace conflicting state rules of practice and procedure. Degnan, 85 Yale L.J. at 755-59; *see also Moore's Federal Practice* § 41.02 (3d ed. 1998). Rule 41(b) — not state law, not the repealed Conformity Act, and not the Supreme Court's superseded nearly 100 year old *Hancock* decision — establishes the *res judicata* effect of federal judgments.[19]

* * * *

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[19] Semtek admits in footnote 10 of its brief that the Conformity Act rule stated in *Hancock* no longer applies in federal question cases following adoption of the Federal Rules of Civil Procedure, but contends that it still somehow applies in diversity cases. There is no support for finding that the statute was repealed for some purposes and not for others. To the extent state courts continue to cite *Hancock*, it is for its first uncontroversial proposition; that the full faith and credit doctrine not only requires state courts to respect the judgments of other states, but also the judgments of the federal courts. *See Osteoimplant Tech., Inc. v. Rathe Prod., Inc.* 107 Md. App. 114, 666 A.2d **[28]** 1310 (1995), *cert. denied*, 340 Md. 648 (1996) (citing *Hancock*). In *Osteoimplant*, the plaintiff, a judgment debtor, was asking the Circuit Court for Baltimore City to reopen a default judgment rendered by the Unites States District Court for the Southern District of New York and recorded in Maryland. 666 A.2d at 1311. When the judgment creditor attempted to enforce the judgment in Maryland, the debtor attempted to contest the amount of the debt by raising argument that were not presented in the federal court case. *Id.* The *Osteoimplant* court, citing *Hancock* for the proposition that a state court just give *res judicata* effect or full faith and credit to a federal judgment, refused to reopen the Southern District's judgment. *Id.* Nothing in *Osteoimplant* supports Semtek here.

SUPPLEMENTAL APPENDIX C

EXCERPT FROM BRIEF OF DEFENDANT/APPELLEE TRANS WORLD AIRLINES, INC., IN

Hillary v. Trans World Airlines, 123 F.3d 1041 (8th Cir. 1997), filed November 27, 1996

[5]

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF TRANS WORLD ON THE GROUNDS THAT HILLARY'S CLAIM WAS BARRED BY RES JUDICATA.

The District Court granted Trans World's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56(c), holding that the judgment and dismissal with prejudice previously entered by the federal court in Louisiana, (Apdx. 10 and 11), operates as res judicata to her claim in Missouri, (Addendum). This Court reviews the District Court's grant of summary judgment *de novo*, applying the same standards as the District Court. *Reliance Ins. Co. v. Shenandoah South, Inc.*, 81 F.3d 789, 791 (8th Cir. 1996). The Court of Appeals must affirm the summary judgment if the record viewed in the light most favorable to the non-moving party show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Marren v. Mutual Life Ins. Co. Of New York*, 84 F.3d 1068, 1070 (8th Cir. 1996); *Anderson v. F.J. Little Machine Co.*, 68 F.3d 1113, 1114 (8th Cir. 1995) (citing F.R.C.P. 56 (c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). As set forth herein, summary judgment should be affirmed.

A. Under Federal Law, the Summary Judgment and Dismissal with Prejudice on Statute of Limitations Grounds Entered by the Louisiana District Court Sitting in Diversity Must Be Given Res Judicata Effect in This Successive Action in Federal Court

The threshold issue before this Court is whether federal or state law should govern the preclusive effect of a federal judgment when the prior court's jurisdiction was based on [6] diversity of citizenship. Trans World urges the Court to follow federal res judicata law to bar Hillary's claim here.

1. Federal, rather than state law, should determine the preclusive effect of the Federal Judgment dismissing Hillary's Louisiana case with prejudice.

Trans World acknowledges that this Court has recently held that state, rather than federal law, governs the preclusive effect of a judgment entered by a federal court sitting in diversity. *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 617 (8th Cir. 1994).[1] However, the majority of circuits which have addressed the issue have held that the res judicata effect which will be given the judgment of a federal court is distinctly a matter of federal law. *J.Z.G. Resources, Inc. v. Shelby Ins. Co.*, 84 F.3d 211, 213 (6th Cir. 1996); *Havoco of America, Ltd. v. Freeman, Atkins & Coleman*, Ltd., 58 F.3d 303, 307 (7th Cir. 1995); *Johnson v. SCA Disposal Services of New England, Inc.*, 931 F.2d 970, 974 (1st Cir. 1991); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989); *Steve D. Thompson Trucking v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045 (5th Cir. 1989); *Gibbs v. Air Canada*, 810 F.2d 1529; 1535 (11th Cir. 1987); *Hunt v. Liberty Lobby Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1962). See also, Restatement (Second) Judgments §387 (1982). Because of the unique federal interests involved, Trans World respectfully and in good faith urges this Court to

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[1] While the Court in *Austin* held state law applied, it acknowledged that the result under state law was essentially the same as federal law. 31 F.3d at 618, n.5.

reconsider the method in [7] which it determines the *res judicata* effect of a federal judgment.

Unlike state court judgments, a federal judgment can be, as in this instance, uniquely intertwined with the Federal Rules of Civil Procedure. Utilizing state res judicata law to determine the effect of a federal court judgment could put at risk firmly rooted federal rules. This was recognized by the Court of Appeals for the Second Circuit in *Kern v. Hettinger*:

> One of the strongest policies a court can have is that of determining the scope of its own judgments. (citation omitted) * * * It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of the federal jurisdiction is diversity. The rights and obligations of the parties are fixed by the state through its own judicial establishment. But we think it would be strange to allow a state to nullify the judgments of federal courts constitutionally established and given the power also to enforce state created rights. The Erie doctrine [*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)] is not applicable here . . . .

303 F.2d 333, 340 (2d Cir. 1982).

In a very similar factual scenario as presented here, the Fourth Circuit noted that although state law governs the rights and duties of the parties in a federal action founded upon diversity of citizenship under *Erie*, "questions of the effect and scope of the [federal court's] judgment involve the power of federal tribunal itself, and are not varied merely because the state rules of decision underlie the judgment." *Shoup v. Bell & Howell Co.*, 572 F.2d at 1179 (citing *Harnett v. Billman*, 800 F.2d 1308, 1312 (4th Cir. 1986)). These courts were concerned that [8] applying state law could abrogate the power and effect of a federal judgment.

This is especially true when the federal judgment rests in large measure on the application of the federal courts' powers under the Federal Rules of Civil Procedure and the federal interpretation and construction given those rules. While a prior federal court may utilize state law to determine whether judgment should be entered it in fact applies state law by way of and through the Federal Rules. Certainly in the case of voluntary and involuntary dismissals, the Federal Rules appear to dictate the preclusive scope of a federal judgment. *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128 (10th Cir.), *cert. denied*, 502 U.S. 942 (1991); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978).

As in *Steve D. Thomson, Shoup, Murphy, and PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983), this case involves the federal court in Louisiana dismissing a claim with prejudice pursuant to the Fed. R. Civ. P. 56, 41(a), and by implication Rule 41 (b). The Louisiana District Court, as well as the Fifth Circuit, utilized the power and import of federal common law to interpret Rule 41(a) to hold that Hillary's motion for voluntary dismissal without prejudice was properly denied and that the judgment and dismissal was to be entered with prejudice.[2]

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[2] While affirming the summary judgment based on the statute of limitations defense, the Fifth Circuit's opinion primarily focused on its interpretation of Rule 41(a) and whether the denial of [9] Hillary's voluntary dismissal motion without prejudice was proper. Citing the *Phillips v. Illinois Cent. Gulf R.R.*, 874 (5th Cir. 1989), it held that such denial was appropriate because Trans World would otherwise have been stripped of its "absolute defense" of statute of limitations. (Apdx. 22 at 25-26). With an obvious eye to the federal litigation in Missouri given its opinion in *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044 (5th Cir. 1989), the Fifth Circuit took great pains to interpret the Federal Rule and federal common law in determining whether the dismissal should have been with or without prejudice.

As will be addressed *infra* at I(A)(2)., under federal common law, if a dismissal is "involuntary" or "with prejudice" it is "an adjudication on the merits" precluding duplicative litigation in the future on the same claim. In fact, it could easily be argued that the "with" or "without prejudice" provisions of Rules 41(a) and (b) were formed distinctly for the purpose of pre-determining the preclusive effect of a federal court judgment. It is then

(Apdx. 11 and 22). The Federal Rules of [9] Civil Procedure and the federal common law in interpreting and construing the federal rules were pivotal to the Louisiana District Court's judgment that the applicable state law barred Hillary's claim. Therefore, the preclusive effect of that federal judgment should be determined solely by force and magnitude of the Court's application of the Federal Rules of Civil Procedure and federal common law, not state law.[3]

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important to note that neither Rule 41(a) and (b) were formed distinctly for the purpose of pre-determining the preclusive effect of a federal court judgment. It is then important to note that neither Rule 41(a) or (b) distinguishes judgments rendered in courts whose jurisdiction is based on diversity or ones based on federal question. To allow state *res judicata* law determine the effect of the judgment that rests largely on interpretation of the federal rules leaves open the possibility that a federal judgment and dismissal with prejudice will not have the preclusive effect obviously intended by the federal rules.

[3] As discussed by Judge Gunn here, the Court in *Reinke v. Boden*, 45 F.3d 166, 170-171 (7th Cir.), *cert. denied*, -- U.S.--, 116 S. Ct.74 (1995), recognized that there is a difference between an intersystem dismissal (a judgment rendered by a state court and a subsequent action in federal court) and an intrasystem dismissal (a judgment entered by a federal court and a subsequent judgment entered by a federal court). (Addendum at 7). Although the *Reinke* court did somewhat explore the difference, [illegible] promotion of judicial economy in the system, it implicitly recognized that the result of such distinction was that the first system's forum (federal or state) law should govern the res judicata effect of its [10] judgments. *Reinke* thoroughly discussed Minnesota's intentions and right to determine the res judicata scope of its state court judgment. *Id.* at 170-172. Therefore, it stands to reason that the federal courts similarly have the right to determine the scope of their judgments and the subsequent effect in their judicial system. If for no other reason, federal res judicata law ought to apply since it is the federal judicial system which is being overburdened with multiple duplicative lawsuits.

Supreme Court, U.S.
FILED
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No. 99-1551

IN THE

Supreme Court of the United States

Semtek International Incorporated,

Petitioner,

v.

Lockheed Martin Corporation,

Respondent.

On Writ of Certiorari
to the Court of Special Appeals
to Maryland

JOINT APPENDIX

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50 pp

TABLE OF CONTENTS

Relevant Docket Entries 1

Complaint in Maryland Action 2

Complaint in California Action 27

RELEVANT DOCKET ENTRIES

070297	File Complaint
072497	Notice of Removal to US District Court FD
100698	Order of Federal Court Remanding Case Back to Circuit Court and Original Papers Filed
030398	Defts Motion to Dismiss Complaint, Request for Hearing, Memo, and Exhibits FD
032398	Pltff's Request for Judicial Notice
032398	Pltff Opposition Semtek International Incorporated to Motion of Deft Lockheed Martin Corporation to Dismiss Pltff's Complaint and Exhibits FD
041398	Defendants' Reply Memorandum of Points and Authorities Supporting Its Motion to Dismiss Plaintiff's complaint Pursuant to Maryland Rule 2-322(b)(2)
043098	Order of Court That Deft Motion to Dismiss is Granted, That the Above Captioned Case Is Dismissed With Prejudice; and It Is Further, Order [sic] That Pltff Shall Pay the Costs
050698	Judgment Entered in Favor of the Defendant for Costs

COMPLAINT IN MARYLAND ACTION

SEMTEK INTERNATIONAL INCORPORATED 78 Border Road Concord, Massachusetts 01742	:	IN THE
Plaintiffs	:	CIRCUIT COURT
v.	:	
LOCKHEED MARTIN CORPORATION Successor by Merger to MARTIN MARIETTA TECHNOLOGIES, INC. Advanced Development and Technology Operations; AND DOES 1 through 100	:	FOR BALTIMORE CITY
SERVE ON RESIDENT AGENT: Jennifer E. Bashaw 6801 Rockledge Drive Bethesda, Maryland 20718-0000	:	
Defendants	:	Case No:

: : : : :

COMPLAINT

COMES NOW the Plaintiff, SEMTEK INTERNATIONAL INCORPORATED, by their attorneys, Marvin Ellin, Michael P. Smith, Ellin & Baker; Walter J. Lack, Engstrom, Lipscomb & Lack; and Thomas V. Girardi, Girardi & Keese and sues LOCKHEED MARTIN CORPORATION, Successor by Merger to MARTIN MARIETTA TECHNOLOGIES, INC. Advanced Development and Technology Operations; and DOES I through 100.

Factual Background

1. The true names and capacities, whether individual, corporate, associate or otherwise, of DOES 1-100 are unknown to plaintiff, who therefore sues those defendants by those fictitious names. Each fictitiously designated defendants is in

some manner legally responsible or liable for the acts and omissions hereinafter alleged and for any damages awarded in this litigation. Plaintiff will seek leave of court to amend this complaint when the true names and capacities of the fictitiously designated defendants become known.

2. Each defendant is the agent, servant, employee, or joint venturer of each and every other defendant, and in doing the acts or taking the positions alleged herein, was acting within the course and scope of that agency, service, employment, or joint venture.

3. Defendant, LOCKHEED MARTIN CORPORATION is a corporation organized and existing under the laws of one of the United States, and doing business in Maryland, including Baltimore City. LOCKHEED MARTIN CORPORATION is the successor by reason of a merger occurring in approximately August, 1994 to MARTIN MARIETTA TECHNOLOGIES, INC. Advanced Development and Technology Operations [hereinafter MARTIN MARIETTA].

4. The communications and negotiations of contract terms involving the defendants and MERKURIY, LTD. which constituted the inducement to MERKURIY to breach its contract with plaintiff and the interference with plaintiff's prospective economic advantage, as hereinafter set forth, occurred in part in Maryland.

5. Plaintiff SEMTEK INTERNATIONAL INCORPORATED was formed in 1992 for the purpose of engaging in commercial relationships with emerging Russian private enterprises. One of SEMTEK'S principals, Dr. Edward K. Shapiro [hereinafter Shapiro] is a Russian born United States citizen who has maintained regular contact with Russian officials. In late October, 1992, several officers of SEMTEK traveled to Russia to meet with Pyotr Sivirin [hereinafter Sivirin] executive director of MERKURIY LTD. [hereinafter MERKURIY]. MERKURIY had been licensed by the Russian Space Agency to make certain satellites available for

commercial use, including the rental of international communications channels for the transmission of voice, video, or data signals.

6. The October, 1992 meetings led to execution on November 5, 1992 of a document entitled "Business Agreement" by Shapiro on behalf of SEMTEK and by Sivirin on behalf of MERKURIY, whereby both parties agreed to discuss creation of a joint venture to develop and use satellite telecommunications systems in which MERKURIY would provide development and launch capability and SEMTEK would provide financial and marketing. A Copy of the English translation of that Business Agreement is attached as Exhibit 1 hereto and incorporated herein by this reference.

7. In December, 1992, officers of SEMTEK again traveled to Russia, this time accompanied by Michael Garcia, SEMTEK's satellite communications consultant, to meet with Sivirin. On or about December 19, 1992, after three days of meetings, SEMTEK officials, Garcia, and Sivirin on behalf of MERKURIY entered into a written agreement, entitled "Protocol", to form a joint venture for the operation and marketing of satellite communications services. The Protocol obligated SEMTEK to provide adequate financing, marketing, and sale for the venture and obligated MERKURIY to provide functional satellites, ground stations, equipment, maintenance and engineering support to ensure the efficient and effective operation of all satellite systems. SEMTEK and MERKURIY further agreed in the Protocol to engage in activities to market the commercial operation of the Luch Satellite series located at 16 degrees West Longitude along with related ground based systems, and agreed that SEMTEK would prepare a business plan containing identified components with respect to the venture's marketing of that satellite. The Protocol included as a possible option marketing the Luch Satellite then in orbit as well. A copy of that Protocol is attached as Exhibit 2 hereto and incorporated herein by this reference.

8. On February 8, 1993, MERKURIY, acting through Sivirin, authorized SEMTEK to act as its agent for the marketing of communication services for the Luch Satellite. A copy of the English translation of that authorization is attached as Exhibit 3 hereto and incorporated herein by this reference. Also in February, 1993, MERKURIY notified SEMTEK that the Luch Satellite then in orbit could not be part of the joint venture, and the joint venture would involve only future Luch Satellites.

9. Between February 8, 1993 and May 2, 1993, in performance of its obligations under the Protocol, SEMTEK commissioned a detailed marketing study of the satellite communications market by Centrex Communications, Inc., a nationally recognized satellite communications consulting firm. This extensive study confirmed SEMTEK estimates that a substantial current and future market existed for services available through the Luch Satellite configuration.

10. In early May, 1993, following detailed technical discussions in Ottawa and Montreal, SEMTEK officers and Leslie Collins, president of Centrex Communications, met with Sivirin. This meeting resulted in the May 2, 1993 execution by MERKURIY and SEMTEK of a further agreement, entitled "Letter of Intent to Establish a Joint Venture Company Between Merkuriy, Ltd. and Semtek International Incorporated." This agreement set forth in detail the responsibilities of SEMTEK to maintain and staff a United States office for the venture, maintain bank accounts, provide accounting services, direct marketing activities, obtain necessary licenses, permits and legal rights, and contribute 50% of the capitalization. This agreement also set forth in detail the responsibilities of MERKURIY to maintain and staff a Russian office, secure all necessary Russian government approvals, provide all technical and engineering services, operate and maintain the satellite and transponders, provide customer support services, and contribute 50% of the capital in the form of facilities and equipment. The Letter of Intent encompassed the Luch I Satellite, which at that time was

the next generation of satellite yet to launched, and provided that the Joint Venture would have exclusive rights to market communication services on the Luch I Satellite. The Letter of Intent comprised an agreement on all essential terms of the Joint Venture and expressed an intent that MERKURIY and SEMTEK would enter into a formal Joint Venture Agreement by May 31, 1993. A copy of the English translation of that Letter of Intent is attached as Exhibit 4 hereto and incorporated herein by this reference.

11. From February, 1993 through the end of the year, SEMTEK and MERKURIY engaged in continual discussions concerning, among other subjects, the cost of modifications needed for the Luch I Satellite. Also during this time frame, SEMTEK engaged in negotiations with investment banking firms to raise the capital needed to fund the SEMTEK obligations under the Letter of Intent agreement and the Protocol. SEMTEK also prepared the business plan.

12. On or about December 10, 1993, SEMTEK officers met with Sivirin in Washington, D. C. to further refine the satellite modification costs and to review the business plan drafted by SEMTEK for the Joint Venture. At this meeting SEMTEK and MERKURIY agreed that MERKURIY would define a fixed cost for satellite modifications which it would transmit to SEMTEK. SEMTEK delivered the business plan to Sivirin.

13. SEMTEK thereafter continued to refine the business plan, worked with at least three investment banking groups on financing, and began interviewing potential senior management team members to be employed by the Joint Venture.

14. Inasmuch as MERKURIY had not completed certain of its tasks, Sivirin wrote to SEMTEK on February 2, 1994 confirming MERKURIY's intention regarding the founding of a joint venture with SEMTEK, and extending the time for entering a formal joint venture agreement to December 31, 1994. A copy of an English translation of that written confirmation is attached as Exhibit 5 hereto and incorporated herein by this reference.

15. From February, 1994 through June, 1994, SEMTEK continued its work in developing staff for the joint venture, regularly communicated with Sivirin, and formally contracted with the State Street Business Group, an investment banking firm, for the purpose of raising capital for the venture and for financial advisory services. Due diligence for funding had been completed.

16. In May, 1994, Sivirin informed SEMTEK by telephone that MARTIN MARIETTA had expressed interest in the Luch I Satellite project. Sivirin said MARTIN MARIETTA would supply technical assistance to the project, but confirmed that the Joint Venture between MERKURIY and SEMTEK was still on course.

17. On June 12, 1994, SEMTEK invited Sivirin to visit the United States to meet with the proposed Joint Venture management and staff experts SEMTEK had selected, to conclude arrangements for the Joint Venture's business, and to meet with appropriate officials of MARTIN MARIETTA to coordinate the work of each party.

18. On June 20, 1994, at SEMTEK's request, MERKURIY again confirmed in writing the legal validity of the May 2, 1993 Letter of Intent and the February 2, 1994 extension letter, and reaffirmed its intent to create the joint venture for commercial use of the Luch I Satellite in accordance with those agreements. A copy of an English translation of that written confirmation is attached as Exhibit 6 hereto and incorporated herein by this reference.

19. On July 5, 1994, Sivirin sent a telefax to SEMTEK accepting in principle the invitation to meet in the United Sates but requesting a delay of the meeting to give MERKURIY time to settle arrangements with MARTIN MARIETTA for those meetings and to enable Sivirin to complete visa arrangements. In a telephone conversation on that same date, Sivirin indicated for the first time that the SEMTEK/MERKURIY Joint Venture might be in jeopardy due to the involvement of MARTIN

interference by Transworld and MARTIN MARIETTA which caused Sivirin to disregard the extension he had given to the end of the year for completing the joint venture agreement.

26. Although it initially refused to even look at the SEMTEK/MERKURIY agreements, MARTIN MARIETTA eventually did agree to have its general counsel in Maryland review the SEMTEK/MERKURIY agreements, but steadfastly to this day has refused to allow SEMTEK to review the agreements between MERKURIY, Transworld, and MARTIN MARIETTA, despite requests by SEMTEK that it be allowed to review those agreements. After reviewing the SEMTEK/MERKURIY agreements, MARTIN MARIETTA's general counsel from Maryland acknowledged that SEMTEK and MERKURIY had an agreement or relationship in place for commercialization and marketing of the Luch I Satellite. He also stated that negotiations were underway among MERKURIY, Transworld, and MARTIN MARIETTA, but did not indicate that those parties had reached an agreement. In fact, MERKURIY, Transworld and MARTIN MARIETTA did not enter their agreement until March, 1995.

27. SEMTEK made extensive efforts to revive its contract and economic relationship with MERKURIY, but Sivirin indicated that although his July 27, 1994 letter was "unfortunate", his hands were tied and he could not avoid dealing with Transworld, Millman, and MARTIN MARIETTA. He further indicated in December, 1994 that it was beyond his power to change the arrangements for the commercialization of the satellite.

28. At all times mentioned herein, Transworld was strictly a front company for MARTIN MARIETTA. MARTIN MARIETTA fully financed, directed and controlled the activities of Transworld and its president, Richard Millman. MARTIN MARIETTA acted through this ostensibly separate company in order to avoid or minimize the risk of prosecution or other adverse consequences to it that could accrue as a result of

improper payments to Russian officials that would violate the Foreign Corrupt Practices Act or other laws, and to avoid civil liability for inducing breach of contract or interfering with SEMTEK'S prospective economic advantage.

29. At all times mentioned herein, MARTIN MARIETTA so controlled and dominated Transworld that Transworld had no real separate corporate existence apart from that of MARTIN MARIETTA, resulting in a complete unity of interest between those two companies such that Transworld is merely the alter ego of MARTIN MARIETTA. Transworld was completely undercapitalized for its purported business of commercialization of the Luch Satellite and was entirely dependant for funding on MARTIN MARIETTA. Transworld had no expertise within its company for conducting its purported business of commercialization of the Luch Satellite and was entirely dependant for that expertise on MARTIN MARIETTA. MARTIN MARIETTA attended all meetings, received all correspondence, and made all important business decisions with respect to Transworld's purported business of commercialization of the Luch Satellite. The individuality and separateness of those two companies had ceased, and Transworld was a mere shell which MARTIN MARIETTA used as a conduit for its own business affairs.

30. Adhering to the fiction that Transworld has a separate corporate existence from MARTIN MARIETTA would perpetrate a fraud on plaintiff, would promote injustice, would yield an inequitable result and would constitute an abuse of the corporate privilege in that Transworld secured its contract or contracts with MERKURIY, in derogation of the rights, contracts, and economic relationship SEMTEK had with MERKURIY, and for the benefit of MARTIN MARIETTA, by means of improper payments to Sivirin or Russian officials in positions superior to Sivirin, or by other improper means, all financed and directed, approved, or ratified by MARTIN MARIETTA.

31. MARTIN MARIETTA fraudulently misrepresented or concealed certain facts essential to SEMTEK'S claim in this Complaint, and SEMTEK only first learned of all the essential facts giving rise to a cause of action against those defendants within two years of filing this complaint. In particular, MARTIN MARIETTA falsely represented that it had no financial interest in Transworld and no direct involvement with MERKURIY, and that its only role in the transaction was pursuant to contractual arrangements with Transworld. MARTIN MARIETTA also represented that it had conducted an internal review from its home office in Maryland and that review established that it had not interfered with the SEMTEK/MERKURIY contract. MARTIN MARIETTA also falsely represented from Maryland that Transworld had prior rights because Transworld already had a contract with MERKURIY for the next generation Luch Satellite at the time SEMTEK entered its Letter of Intent. Within two years of filing this complaint, SEMTEK has learned that all of these representations were false, and that the true facts were that MARTIN MARIETTA has a controlling financial interest in Transworld and in fact did control Transworld in connection with the latter's transaction with MERKURIY, and that Transworld and MARTIN MARIETTA did not complete a contract with MERKURIY until at least March, 1995, long after initially beginning their interference with SEMTEK's prospective economic advantage by inducing MERKURIY to breach its contract with SEMTEK or inducing MERKURIY to terminate the advantageous economic relationship SEMTEK had with MERKURIY. SEMTEK had no means to discover this information earlier other than from MARTIN MARIETTA, and it had refused to disclose those facts.

COUNT ONE

(For Damages for Inducing Breach of Contract)

32. Plaintiff refers to paragraphs 1 to 31, and incorporates each of those paragraphs as if set forth in full at this point.

33. As of no later than May 3, 1993, SEMTEK had a valid and enforceable contract with MERKURIY consisting of the Business Agreement, the Protocol, the agency authorization, and the Letter of Intent, which together contained all essential terms for the formation of a Joint Venture with the exclusive right to sell data transmission services on a commercial basis worldwide. The Joint Venture embodied in these documents related to the next generation of Luch Satellite and to other satellites MERKURIY would assign to the Joint Venture. The Protocol also potentially related to the Luch Satellite already in orbit, but that part of the transaction never materialized because Transworld had prior rights to that satellite and the transaction with respect to that satellite was only intended to move forward if Transworld remained in breach of its prior agreement, as it was at the time of the Business Agreement and Protocol. The Letter of Intent referred to the next generation of satellite as Luch I. MARTIN MARIETTA, in its correspondence and other documentation, referred to this next generation of satellite as Loutch II, to denote some additional modifications made by MARTIN MARIETTA to make the satellite conform to its application.

34. The contract between SEMTEK and MERKURIY afforded a high probability of substantial economic benefit to SEMTEK, in that such satellite contains four transponders, and each transponder could produce revenues of up to $2,000,000 per year, and up to three times that amount with compression devices deployed that would enable each transponder to send more than one signal simultaneously. The guaranteed life of the Luch Satellite is three years, but the usual useful life is five years. The contract contemplated two Luch satellites. Anticipated revenues to the Joint Venture thus ranged from $48,000,000 to $80,000,000 depending on the life of the satellite, before application of the compression technology, which could have tripled revenue. The investment required would not exceed $5,000,000 so the contract could have resulted in SEMTEK receiving over $100,000,000 net of expenses over

the course of five years.

35. At all times mentioned herein, MARTIN MARIETTA was aware of the existence of the contract between SEMTEK and MERKURIY. MARTIN MARIETTA also had a desire to obtain some or all of the rights to commercially market the satellite transmission capacity for its own economic benefit.

36. With knowledge of SEMTEK's contract with MERKURIY, MARTIN MARIETTA, acting directly or through Transworld, offered economic incentives and other consideration, and made improper payments, to either Sivirin or superiors of Sivirin, or to MERKURIY, for the express purpose of securing for MARTIN MARIETTA or its front company Transworld the rights to commercially market the Luch I Satellite which it knew belonged to SEMTEK, all for the pecuniary benefit of MARTIN MARIETTA. MARTIN MARIETTA, acting directly or through Transworld and Millman, also advised, counseled, and persuaded MERKURIY that it could breach, disavow, or otherwise avoid its contract with SEMTEK by asserting that no contract had been formed, and that the parties had failed to timely form the Joint Venture, when in fact a contract already existed and the time to complete the business plan and formal joint venture document had been extended and had not yet expired. In offering those incentives and other consideration, making those payments, and persuading MERKURIY to take those positions disavowing the contract with SEMTEK, MARTIN MARIETTA violated fair and ethical business practices, the MARTIN MARIETTA code of business ethics, and the law. MARTIN MARIETTA committed those acts with the specific intent of inducing MERKURIY to breach and disavow its contract with SEMTEK and instead enter into a contact with Transworld and/or MARTIN MARIETTA. MARTIN MARIETTA intended to interfere with the established relationship between SEMTEK and MERKURIY, and its acts were designed to disrupt that relationship and deprive SEMTEK of the economic benefit of its contract with MERKURIY.

37. The acts of MARTIN MARIETTA as described above did in fact induce MERKURIY to breach its contract with SEMTEK and did in fact actually dispute the economic relationship between SEMTEK and MERKURIY in that on August 8, 1994, MERKURIY faxed to SEMTEK a July 27, 1994 letter informing SEMTEK that no contract existed between them and the Letter of Intent was not binding, and falsely stating that the parties had failed to timely complete the Joint Venture. MERKURIY instead entered into a contract with Transworld and/or MARTIN MARIETTA, and thereafter refused to continue performing under its contract with SEMTEK.

38. As a direct and proximate result of MARTIN MARIETTA's inducing MERKURIY to breach its contract with SEMTEK, SEMTEK has suffered damages in the form of loss of income in excess of $100,000,000 from the Luch I Satellite, plus interest thereon according to proof. The Luch I Satellite was only first launched within the last two years, and SEMTEK therefore only suffered its damages commencing with the last two years, as the satellite must be launched before SEMTEK would start receiving income.

39. The acts of MARTIN MARIETTA as described above were performed with malice, oppression, fraud and ill will, with an intent to vex, injure, and annoy SEMTEK, and with a conscious disregard of SEMTEK's rights, all of which warrants the imposition of punitive or exemplary damages in an amount to be determined at trial.

COUNT TWO

(For Damages for Intentional Interference

With Prospective Economic Advantage)

40. Plaintiff refers to paragraphs 1 to 31, and incorporates each of these paragraphs as if set in full at this point.

41. At all times mentioned herein, an economic relationship existed between SEMTEK and MERKURIY whereby those entities would engage in a Joint Venture that would have the

exclusive worldwide right to sell data transmission services via the Luch I Satellite on a commercial basis. This economic relationship consisted of the agreements set forth in the Business Agreement, the Protocol, and the Letter of Intent described above, as well as the extensive steps taken by SEMTEK to interview and assemble highly qualified staff, engage the services of an investment banking firm, retain consultants in satellite technology and marketing, prepare a business plan, and participate in meetings, conversations and correspondence with MERKURIY and others concerning the business of the Joint Venture. While the Business Agreement and Protocol related to the Luch Satellite that was in orbit at the time and applied only if Transworld, which had the marketing rights for that satellite, continued to breach its agreement with MERKURIY as it had at that time, the Letter of Intent applied to the Luch I Satellite to be launched at a then undetermined date in the future. The Luch I Satellite was later referred to as Loutch II in MARTIN MARIETTA correspondence and documents, denoting some additional modifications LOCKHEED MARTIN made for compatibility with its own application. SEMTEK and MERKURIY were progressing toward completion of a final Joint Venture document which would encompass the business plan and set forth their arrangement in greater detail than the Letter of Intent previously signed and would have concluded that arrangement if not for the interference of MARTIN MARIETTA.

42. The economic relationship between SEMTEK and MERKURIY afforded a high probability of substantial economic benefit to SEMTEK, in that each satellite contains four transponders, and each transponder could produce revenues of up to $2,000,000 per year, and up to three times that amount with compression devices deployed that would enable each transponder to send more than one signal simultaneously. The guaranteed life of the Luch I Satellite is three years, but the usual useful life is five years. The business plan contemplated two Luch satellites. Anticipated revenues to the Joint Venture thus

ranged from $48,000,000 to $80,000,000 depending on the life of the satellite, before application of the compression technology, which could have tripled revenue. The investment required would not exceed $5,000,000, so the contract could have resulted in SEMTEK receiving over $100,000,000 net of expenses over the course of five years.

43. At all times mentioned herein, MARTIN MARIETTA was aware of the existence of the advantageous relationship between SEMTEK and MERKURIY. MARTIN MARIETTA also had a desire to obtain some or all of the rights to commercially market the satellite transmission capacity for its own economic benefit.

44. With knowledge of SEMTEK'S advantageous economic relationship with MERKURIY, MARTIN MARIETTA, acting directly or through Transworld, offered economic incentives and other consideration, and made improper payments, to either Sivirin or superiors of Sivirin, or to MERKURIY, for the express purpose of securing for MARTIN MARIETTA or its front company Transworld the rights to commercially market the Luch Satellite which it knew belonged to SEMTEK, all for the pecuniary benefit of MARTIN MARIETTA. MARTIN MARIETTA, acting directly or through Transworld and Millman, also advised, counseled, and persuaded MERKURIY that it could disavow, terminate, or otherwise avoid its relationship with SEMTEK by asserting that no contract had been formed, and that the parties had failed to timely form the Joint Venture, when in fact the time to complete the business plan and formal joint venture document had been extended and had not yet expired, and SEMTEK and MERKURIY did not have a relationship which, if not disrupted by MARTIN MARIETTA, would have resulted in economic benefits for both SEMTEk and MERKURIY. In offering those incentives and other consideration, making those payments, and persuading MERKURIY to take those positions disavowing and terminating its relationship with SEMTEK, MARTIN MARIETTA violated

fair and ethical business practices, the MARTIN MARIETTA code of business ethics, and the law. MARTIN MARIETTA committed those acts with the specific intent of interfering with SEMTEK's advantageous economic relationship with MERKURIY and interfering with SEMTEK's prospective economic advantage. MARTIN MARIETTA's acts were designed to disrupt that relationship and deprive SEMTEK of the economic benefit of its relationship with MERKURIY.

45. The acts of MARTIN MARIETTA as described above did in fact actually disrupt the economic relationship between SEMTEK and MERKURIY and did in fact interfere with SEMTEK's prospective economic advantage in that on August 8, 1994, MERKURIY faxed to SEMTEK a July 27, 1994 letter informing SEMTEK that no contract existed between them and that the Letter of Intent was not binding, and falsely stating that the parties had failed to timely complete the Joint Venture. MERKURIY instead entered into a contract with Transworld and/or MARTIN MARIETTA for the same rights to market commercially the data transmission capacity of the Luch I Satellite, and thereafter refused to continue its relationship with SEMTEK.

46. As a direct proximate result of MARTIN MARIETTA's interference with SEMTEK's prospective economic advantage, SEMTEK has suffered damages in the form of loss in income in excess of $100,000,000 from the Luch I Satellite, plus interest thereon according to proof. The Luch I Satellite was only first launched within the last two years, and SEMTEK therefor suffered its damages commencing within the last two years, as the satellite must be launched before SEMTEK would start receiving income.

47. The acts of MARTIN MARIETTA as described above were performed with malice, oppression, fraud and ill will, with an intent to vex, injure, and annoy SEMTEK, and with a conscious disregard of SEMTEK's rights, all of which warrants the imposition of punitive or exemplary damages in an amount

to be determined at trial.

COUNT THREE

(For Damages for Negligent Interference

With Prospective Economic Advantage)

48. Plaintiff refers to paragraphs 1 to 31, and incorporates each of those paragraphs as it set forth in full at this point.

49. At all times mentioned herein, an economic relationship existed between SEMTEK and MERKURIY whereby those entities would engage in a Joint Venture that would have the exclusive worldwide right to sell data transmission services via the Luch I Satellite on a commercial basis. This economic relationship consisted of the agreements set forth in the Business Agreement, Protocol, and the Letter of Intent described above, as well as the extensive steps taken by SEMTEK to interview and assemble highly qualified staff, engage the services of an investment banking firm, retain consultants in satellite technology and marketing, prepare a business plan, and participate in meetings, conversations and correspondence with MERKURIY and others concerning the business of the Joint Venture. While the Business Agreement and Protocol related to the Luch Satellite that was in orbit at the time and applied only if Transworld, which had the marketing rights for that satellite, continued to breach its agreement with MERKURIY as it had at that time, the Letter of Intent applied to the Luch I Satellite to be launched at a then undetermined date in the future. The Luch I Satellite was later referred to as Loutch II in MARTIN MARIETTA correspondence and documents, denoting some additional modifications LOCKHEED MARTIN made for compatibility with its own application. SEMTEK and MERKURIY were progressing toward completion of a final Joint Venture document which would encompass the business plan and set forth their arrangement in greater detail than the Letter of Intent previously signed and would have concluded that arrangement if not for the interference of MARTIN

MARIETTA.

50. The economic relationship between SEMTEK and MERKURIY was intended to benefit both parties economically and afforded a high probability of substantial economic benefit to SEMTEK, in that each satellite contains four transponders, and each transponder could produce revenues of up to $2,000,000 per year, and up to three times that amount with compression devices deployed that would enable each transponder to send more than one signal simultaneously. The guaranteed life of the Luch Satellite is three years, but the usual useful life is five years. The Business plan contemplated two Luch satellites. Anticipated revenues to the Joint Venture thus ranged from $48,000,000 to $80,000,000 depending on the life of the satellite, before application of the compression technology which could have tripled revenue. The investment required would not exceed $5,000,000, so the contract could have resulted in SEMTEK receiving over $100,000,000 net of expenses over the course of five years.

51. At all times mentioned herein, MARTIN MARIETTA was aware of the existence of the advantageous economic relationship between SEMTEK and MERKURIY. MARTIN MARIETTA also had a desire to obtain some or all of the rights to commercially market the satellite transmission capacity for its own economic benefit, and knew that if it did not act with due care, its actions seeking those commercial marketing rights would interfere with the relationship between SEMTEK and MERKURIY, and would cause SEMTEK to lose the probable future economic benefit and prospective economic advantage of its relationship with MERKURIY.

52. With knowledge of SEMTEK's advantageous economic relationship with MERKURIY, MARTIN MARIETTA, acting directly or through Transworld, negligently, carelessly, and unlawfully offered economic incentives and other consideration and made improper payments to either Sivirin or superiors of Sivirin, or to MERKURIY, for the express purpose of securing

for MARTIN MARIETTA or its front company Transworld the rights to commercially market the Luch Satellite which it knew belonged to SEMTEK, all for the pecuniary benefit of MARTIN MARIETTA. MARTIN MARIETTA, acting directly or through Transworld and Millman, also negligently, carelessly, and unlawfully advised, counseled, and persuaded MERKURIY that it could disavow, terminate or otherwise avoid its relationship with SEMTEK by asserting that no contract had been formed, and that the parties had failed to timely form the Joint Venture, when in fact the time to complete the business plan and formal joint venture had been extended and had not yet expired, and SEMTEK and MERKURIY did not have a relationship which, it not disrupted by MARTIN MARIETTA and URSINI, would have resulted in economic benefits for both SEMTEK and MERKURIY. In offering those incentives and other consideration, making those payments, and persuading MERKURIY to take those positions disavowing and terminating its relationship with SEMTEK, MARTIN MARIETTA violated fair and ethical business practices, the MARTIN MARIETTA code of business ethics, and the law. In committing those acts, MARTIN MARIETTA negligently, carelessly, and unlawfully interfered with SEMTEK's advantageous economic relationship with MERKURIY and interfered with SEMTEK's prospective economic advantage.

53. The interference with SEMTEK's advantageous economic relationship with MERKURIY that MARTIN MARIETTA would cause was foreseeable to MARTIN MARIETTA because MARTIN MARIETTA at all relevant times knew about the relationship and joint venture between SEMTEK and MERKURIY, and knew that the commercial marketing rights it was seeking were the same as those rights that were in the subject of the SEMTEK/MERKURIY Joint Venture. Because only one entity could have exclusive marketing rights, and because MARTIN MARIETTA refused to consider a cooperative venture that would include SEMTEK, the injury to SEMTEK from the acts of MARTIN MARIETTA was

virtually certain to occur once the Luch I Satellite capacity was marketed and the Satellite itself was launched.

54. The acts of MARTIN MARIETTA as described above did in fact actually and directly disrupt the economic relationship between SEMTEK and MERKURIY and did in fact interfere with SEMTEK's prospective economic advantage in that on August 8, 1997, MERKURIY faxed to SEMTEK a July 27, 1994 letter informing SEMTEK that no contract existed between them and that the Letter of Intent was not binding, and falsely stating that the parties had failed to timely complete the Joint Venture.

MERKURIY instead entered into a contract with Transworld and/or MARTIN MARIETTA for the same rights to market commercially the data transmission capacity of the Luch I Satellite, and thereafter refused to continue its relationship with SEMTEK.

55. MARTIN MARIETTA persisted in their actions interfering with the SEMTEK/MERKURIY relationship even after it was aware of that relationship, after SEMTEK notified it that its actions were interfering with that relationship, and after SEMTEK notified it that its actions were interfering with that relationship, and after SEMTEK made its agreements available for the review of MARTIN MARIETTA's general counsel. Unless an award of damages is made in this case, LOCKHEED MARTIN as Successor to MARTIN MARIETTA will continue using wrongful means to interfere with smaller United States companies attempting to engage in international commerce in the satellite communications field and in other fields as well.

56. As a direct and proximate result of MARTIN MARIETTA's negligent interference with SEMTEK's prospective economic advantage, SEMTEK has suffered damages in the form of loss of income in excess of $100,000.000 from the Luch I Satellite, plus interest thereon according to proof. The Luch I Satellite was only first launched within the last two years and SEMTEK therefore only suffered its damages commencing within the last two years, as the satellite must be

launched before SEMTEK would start receiving income.

COUNT FOUR

(For Damages for Conspiracy to Interfere

With Prospective Economic Advantage)

57. Plaintiff refers to paragraphs 1 to 31, and 41 to 46, and incorporates each of those paragraphs as if set forth in full at this point.

58. Prior to the events described above, MARTIN MARIETTA entered into a plan, scheme, and conspiracy with Transworld to interfere with SEMTEK's advantageous economic relationship with MERKURIY by making improper or unlawful payments or by other improper or unlawful means, and to capture for itself the right to market the data transmission capabilities of the Luch I Satellite. As part of that plan, scheme, and conspiracy, all payments would be channeled through Transworld but would actually originate with MARTIN MARIETTA, and Transworld would be the contracting party with MERKURIY, even though MARTIN MARIETTA was fully funding Transworld and would receive the financial benefit of the transaction, in order to try to insulate MARTIN MARIETTA from any liability herein and from any liability for any payments made to Russian officials.

59. Pursuant to that conspiracy, MARTIN MARIETTA, acting with and in some cases through Transworld, committed all the acts of interference described above. To further the purposes of the conspiracy, Transworld entered into contracts with MERKURIY for the marketing of the satellite capacity and with MARTIN MARIETTA for the funding, but Transworld itself lacks the financial wherewithal to perform on any of those contracts independently of MARTIN MARIETTA, and was merely a front company for MARTIN MARIETTA in entering those contracts. MARTIN MARIETTA at all times retained ultimate decision-making authority in connection with all activities performed pursuant to the conspiracy as described

above.

60. As a direct and proximate result of MARTIN MARIETTA's conspiracy with Transworld to interfere with SEMTEK's prospective economic advantage, and the actions taken pursuant to that conspiracy, SEMTEK has suffered damages in the form of loss of income in excess of $100,000,000 from the Luch I Satellite, plus interest thereon according to proof. The Luch I Satellite was only first launched within the last two years, as the satellite must by launched before SEMTEK would start receiving income.

61. The acts of MARTIN MARIETTA as described above were performed with malice, oppression, fraud and ill will, with an intent to vex, injure, and annoy SEMTEK, and with a conscious disregard of SEMTEK's rights, all of which warrants the imposition of punitive of exemplary damages in the amount to be determined at trial.

WHEREFORE, Plaintiff prays for judgment against defendants and each of them as follows:

1. For compensatory damages in the sum of at least $100,000,000.

2. For pre-judgment interest thereon according to proof.

3. For punitive or exemplary damages in the amount to be proven at the time of trial.

4. For costs of suit incurred herein.

5. For such further relief as the Court deems just and proper.

Respectfully submitted,

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_____

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COMPLAINT IN CALIFORNIA ACTION

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COURT OF LOS ANGELES

SEMTEK INERNATIONAL INCORPORATED,
Plaintiffs,
v.
LOCKHEED MARTIN CORPORATION, Successor by Merger to MARTIN MARIETTA TECHNOLOGIES, INC. Advanced Development and Technology Operations; SAMUEL M. URSINI; and DOES 1 through 100, Defendants.

CASE NO. BC166512
COMPLAINT FOR
1. INDUCING BREACH OF CONTRACT
2. INTENTIONAL INTERFERENCE WITH ECONOMIC ADVANTAGE
3. NEGLIGENT INTERFERENCE WITH ECONOMIC ADVANTAGE
4. CONSPIRACY TO INTERFERE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Plaintiff SEMTEK INTERNATIONAL, INC. alleges the following for causes of action against defendants, and each of them:

FACTUAL BACKGROUND

1. The true names and capacities, whether individual, corporate, associate or otherwise, of DOES 1100 are unknown to plaintiff, who therefore sues those defendants by those fictitious names. Each fictitiously designated defendant is in some manner legally responsible or liable for the acts and omissions hereinafter alleged and for any damages awarded in this litigation. Plaintiff will seek leave of court to amend this complaint when the true names and capacities of the fictitiously designated defendants become known.

2. Each defendant is the agent, servant, employee, or joint venture of each and every other defendant, and in doing the acts or taking the positions alleged herein, was acting within the course and scope of that agency, service, employment, or joint venture.

3. Defendant, LOCKHEED MARTIN CORPORATION is a corporation organized and existing under the laws of one of the United States, and doing business in the County of Los Angeles, State of California. LOCKHEED MARTIN CORPORATION

is the successor by reason of a merger occurring in approximately August, 1994 to MARTIN MARIETTA TECHNOLOGIES, INC. Advanced Development and Technology Operations [hereinafter MARTIN MARIETTA].

4. Defendant SAMUEL. M. URSINI [hereinafter URSINI] is an individual residing in the County of San Diego, State of California, and was Director of Business Development for MARTIN MARIETTA TECHNOLOGIES, INC. Advanced Development and Technology Operations, and thereafter for LOCKHEED MARTIN Advanced Development Operations at all times relevant to the events giving rise to this lawsuit.

5. The communications and negotiations of contract terms involving the defendants and MERKURIY, LTD. which constituted the inducement to MERKURIY to breach its contract with plaintiff and the interference with plaintiff's prospective economic advantage, as hereinafter set forth, occurred in part in the County of Los Angeles, State of California.

6. Plaintiff SEMTEK INTERNATIONAL INCORPORATED was formed in 1992 for the purpose of engaging in commercial relationships with emerging Russian private enterprises. One of SEMTEK's principals, Dr. Edward K. Shapiro [hereinafter Shapiro], is a Russian born United States citizen who has maintained regular contact with Russian officials. In late October, 1992, several officers of SEMTEK traveled to Russia to meet with Pyotr Sivirin [hereinafter Sivirin], executive director of MERKURIY LTD. [hereinafter MERKURIY] MERKURIY had been licensed by the Russian Space Agency to make certain satellites available for commercial use, including the rental of international communications channels for the transmission of voice, video, or data signals.

7. The October, 1992 meetings led to execution on November 5, 1992 of a document entitled "Business Agreement" by Shapiro on behalf of SEMTEK and by Sivirin on behalf of MERKURIY, whereby both parties agreed to discuss creation of a joint venture to develop and use satellite telecommunications

systems in which MERKURIY would provide development and launch capability and SEMTEK would provide financing and marketing. A copy of the English translation of that Business Agreement is attached as Exhibit 1 hereto and incorporated herein by this reference.

8. In December, 1992, officers of SEMTEK again traveled to Russia, this time accompanied by Michael Garcia, SEMTEK's satellite communications consultant, to meet with Sivirin. On or about December 19, 1992, after three days of meetings, SEMTEK officials, Garcia and Sivirin on behalf of MERKURIY entered into a written agreement, entitled "Protocol", to form a joint venture for the operation and marketing of satellite communications services. The Protocol obligated SEMTEK to provide adequate financing, marketing, and sales for the venture and obligated MERKURIY to provide functional satellites, ground stations, equipment, maintenance and engineering support to ensure the efficient and effective operation of all satellite systems. SEMTEK and MERKURIY further agreed in the Protocol to engage in activities to market the commercial operation of the Luch Satellite series located at 16 degrees West Longitude along with related ground based systems, and agreed that SEMTEK would prepare a business plan containing identified components with respect to the venture's marketing of that satellite. The Protocol included as a possible option marketing the Luch Satellite then in orbit as well. A copy of that Protocol is attached as Exhibit 2 hereto and incorporated herein by this reference.

9. On February 8, 1993, MERKURIY, acting through Sivirin, authorized SEMTEK to act as its agent for the marketing of communication services for the Luch Satellite. A copy of the English translation of that authorization is attached as Exhibit 3 hereto and incorporated herein by this reference. Also, in February, 1993, MERKURIY notified SEMTEK that the Luch Satellite then in orbit could not be part of the joint venture, and the joint venture would involve only future Luch Satellites.

10. Between February 8, 1993 and May 2, 1993, in

performance of its obligations under the Protocol, SEMTEK commissioned a detailed marketing study of the satellite communications market by Centrex Communications Inc., a nationally recognized satellite communications consulting firm. This extensive study confirmed SEMTEK estimates that a substantial current and future market existed for services available through the Luch Satellite configuration.

11. In early May, 1993, following detailed technical discussions in Ottawa and Montreal, SEMTEK officers and Leslie Collins, president of Centrex Communications, met with Sivirin. This meeting resulted in the May 2, 1993 execution by MERKURIY and SEMTEK of a further agreement, entitled "Letter of Intent to Establish a Joint Venture Company Between Merkuriy, Ltd. and Semtek International Incorporated". This agreement set forth in detail the responsibilities of SEMTEK to maintain and staff a United States office for the venture, maintain bank accounts, provide accounting services, direct marketing activities, obtain necessary licenses, permits and legal rights, and contribute 50% of the capitalization. This agreement also set forth in detail the responsibilities of MERKURIY to maintain and staff a Russian office, secure all necessary Russian government approvals, provide all technical and engineering services, operate and maintain the satellite and transponders, provide customer support services, and contribute 50% of the capital in the form of facilities and equipment. The Letter of Intent encompassed the Luch I Satellite, which at that time was the next generation of satellite yet to launched, and provided that the Joint Venture would have exclusive rights to market communication services on the Luch I Satellite. The Letter of Intent comprised an agreement on all essential terms of the Joint Venture and expressed an intent that MERKURIY and SEMTEK would enter into a formal Joint Venture Agreement by May 31, 1993. A copy of the English translation of that Letter of Intent is attached as Exhibit 4 hereto and incorporated herein by this reference.

12. From February, 1993 through the end of the year,

SEMTEK and MERKURIY engaged in continual discussions concerning, among other subjects, the cost of modifications needed for the Luch I Satellite. Also during this time frame, SEMTEK engaged in negotiations with investment banking firms to raise the capital needed to fund the SEMTEK obligations under the Letter of Intent agreement and the Protocol. SEMTEK also prepared the business plan.

13. On or about December 10, 1993, SEMTEK officers met with Sivirin in Washington, D.C. to further refine the satellite modification costs and to review the business plan drafted by SEMTEK for the Joint Venture. At this meeting SEMTEK and MERKURIY agreed that MERKURIY would define a fixed cost for satellite modification which it would transmit to SEMTEK. SEMTEK delivered the business plan to Sivirin.

14. SEMTEK thereafter continued to refine the business Plan, worked with at least three investment banking groups on financing, and began interviewing potential senior management team members to be employed by the Joint Venture.

15. Inasmuch as MERKURIY had not completed certain of its tasks, Sivirin wrote to SEMTEK on February 2, 1994 confirming MERKURIY's intention regarding the founding of a joint venture with SEMTEK, and extending the time for entering a formal joint venture agreement to December 31, 1994. A copy of an English translation of that written confirmation is attached as Exhibit 5 hereto and incorporated herein by this reference.

16. From February, 1994 through June, 1994, SEMTEK continued its work in developing staff for the joint venture, regularly communicated with Sivirin, and formally contracted with the State Street Business Group, an investment banking firm, for the purpose of raising capital for the venture and for financial advisory services. Due diligence for funding had been completed.

17. In May, 1994, Sivirin informed SEMTEK by telephone that MARTIN MARIETTA had expressed interest in the Luch

I Satellite project. Sivirin said MARTIN MARIETTA would supply technical assistance to the project, but confirmed that the Joint Venture between MERKURIY and SEMTEK was still on course.

18. On June 12, 1994, SEMTEK invited Sivirin to visit the United States to meet with the proposed Joint Venture management and staff experts SEMTEK had selected, to conclude arrangements for the Joint Venture's business, and to meet with appropriate officials of MARTIN MARIETTA to coordinate the work of each party.

19. On June 20, 1994, at SEMTEK's request, MERKURIY again confirmed in writing the legal validity of the May 2, 1993 Letter of Intent and February 2, 1994 extension letter, and reaffirmed its intent to create the joint venture for commercial use of the Luch I Satellite in accordance with those agreements. A copy of an English translation of that written confirmation is attached as Exhibit 6 hereto and incorporated herein by this reference.

20. On July 5, 1994, Sivirin sent a telefax to SEMTEK accepting in principle the invitation to meet in the United States but requesting a delay of the meeting to give MERKURIY time to settle arrangements with MARTIN MARIETTA for those meetings and to enable Sivirin to complete visa arrangements. In a telephone conversation on that same date, Sivirin indicated for the first time that the SEMTEK/MERKURIY Joint Venture might be in jeopardy due to the involvement of MARTIN MARIETTA and a third party. This was the first indication from Sivirin that MERKURIY might breach its agreements with SEMTEK, agreements which Sivirin had continually confirmed in writing.

21. On July 6, 1994, SEMTEK wrote to the Chairman of MARTIN MARIETTA formally notifying MARTIN MARIETTA of the SEMTEK/MERKURIY Joint Venture and the fact that any agreement between MARTIN MARIETTA and MERKURIY for commercialization of the Luch Satellite would conflict with the SEMTEK/MERKURIY Joint Venture, and also

requesting a meeting with appropriate MARTIN MARIETTA officers to resolve any such conflicts. A copy of that letter is attached as Exhibit 7 hereto and incorporated herein by this reference.

22. On or about July 12, 1994, officers of SEMTEK met with URSINI and Richard Millman, President of Transworld Communications [hereinafter Transworld]. Millman stated at that meeting that SEMTEK had no joint venture with MERKURIY, that Transworld had a contract with MERKURIY for Luch Satellite development, and that MARTIN MARIETTA was merely engaged in a contractual arrangement with Transworld. Transworld personnel asserted that Sivirin disclaimed any agreements with SEMTEK because the Joint Venture had to be completed by July 31, 1993, notwithstanding that Sivirin himself had extended the completion date for the Joint Venture to December 31, 1994. URSINI agreed with and endorsed Millman's statements in all respects. SEMTEK offered to provide its agreements to the parties at the meeting in order to inform Transworld and MARTIN MARIETTA of the details of the contractual arrangements between SEMTEK and MERKURIY, but Transworld and MARTIN MARIETTA refused that offer.

23. On July 20, 1994, URSINI wrote on behalf of MARTIN MARIETTA that MARTIN MARIETTA had no direct conflict with SEMTEK because MARTIN MARIETTA only had agreements with Transworld, and not with MERKURIY, with respect to commercialization of the new generation of Luch Satellites. In that letter, URSINI referred to the Loutch satellites, which is a spelling variant of Luch that has arisen in transliteration from Russian into English. A copy of that letter is attached as Exhibit 8 hereto and incorporated herein by this reference.

24. Commencing in July, 1994 and continuing to the present time, with full knowledge of the agreements and relationship between SEMTEK and MERKURIY, MARTIN MARIETTA and Transworld entered into and engaged in efforts to secure for

themselves a contract with MERKURIY for the commercial exploitation of the Luch I Satellite, all in conflict with and in derogation of the known rights of SEMTEK and the known relationship between SEMTEK and MERKURIY. Those efforts culminated in MARTIN MARIETTA and Transworld securing a contract with MERKURIY at a later date whereby MARTIN MARIETTA and Transworld would provide the financing and marketing for the satellite, and MERKURIY would provide the engineering, technology, and hardware. MARTIN MARIETTA and Transworld thereby took over the position and responsibilities of plaintiff in its relationship with MERKURIY.

25. On August 1, 1994, SEMTEK wrote to URSINI notifying him that as the party financing Transworld's venture with MERKURIY for commercialization of the Luch Satellite and as the party primarily benefiting from that venture financially, MARTIN MARIETTA was interfering with SEMTEK's ongoing relationship with MERKURIY. A copy of that letter is attached as Exhibit 9 hereto and incorporated herein by this reference.

26. On August 8, 1994, SEMTEK received by fax a letter dated July 27, 1994 from Sivirin asserting that the Letter of Intent was not binding, that the Joint Venture had to be established by July 4. 1993, and that the Joint Venture was not formed due to the efforts of Transworld. A copy of that letter is attached as Exhibit 10 hereto and incorporated herein by this reference. Sivirin wrote this letter as a direct result of acts of interference by Transworld and MARTIN MARIETTA which caused Sivirin to disregard the extension he had given to the end of the year for completing the joint venture agreement.

27. Although it initially refused to even look at the SEMTEK/MERKURIY agreements, MARTIN MARIETTA eventually did agree to have its general counsel review the SEMTEK/MERKURIY agreements, but steadfastly to this day has refused to allow SEMTEK to review the agreements between MERKURIY, Transworld, and MARTIN MARIETTA, despite requests by SEMTEK that it be allowed to review those agreements. After reviewing the SEMTEK/MERKURIY

agreements, MARTIN MARIETTA's general counsel acknowledged that SEMTEK and MERKURIY had an agreement or relationship in place for commercialization and marketing of the Luch I Satellite. He also stated that negotiations were underway among MERKURIY, Transworld, and MARTIN MARIETTA, but did not indicate that those parties had reached an agreement. In fact, MERKURIY, Transworld and MARTIN MARIETTA did not enter their agreement until March, 1995.

28. SEMTEK made extensive efforts to revive its contract and economic relationship with MERKURIY, but Sivirin indicated that although his July 27, 1994 letter was "unfortunate", his hands were tied and he could not avoid dealing with Transworld, Millman, and MARTIN MARIETTA. He further indicated in December, 1994 that it was beyond his power to change the arrangements for the commercialization of the satellite.

29. At all times mentioned herein, Transworld was strictly a front company for MARTIN MARIETTA. MARTIN MARIETTA fully financed, directed and controlled the activities of Transworld and its president, Richard Millman. MARTIN MARIETTA acted through this ostensibly separate company in order to avoid or minimize the risk of prosecution or other adverse consequences to it that could accrue as a result of improper payments to Russian officials that could violate the Foreign Corrupt Practices Act or other laws, and to avoid civil liability for inducing breach of contract or interfering with SEMTEK's prospective economic advantage.

30. At all times mentioned herein, MARTIN MARIETTA so controlled and dominated Transworld that Transworld had no real separate corporate existence apart from that of MARTIN MARIETTA, resulting in a complete unity of interest between those two companies such that Transworld is merely the alter ego of MARTIN MARIETTA. Transworld was completely undercapitalized for its purported business of commercialization of the Luch Satellite and was entirely dependant for funding on

MARTIN MARIETTA. Transworld had no expertise within its company for conducting its purported business of commercialization of the Luch Satellite and was entirely dependent for that expertise on MARTIN MARIETTA. MARTIN MARIETTA attended all meetings, received all correspondence, and made all important business decisions with respect to Transworld's purported business of commercialization of the Luch Satellite. The individuality and separateness of those two companies had ceased, and Transworld was a mere shell which MARTIN MARIETTA used as a conduit for its own business affairs.

31. Adhering to the fiction that Transworld has a separate corporate existence from MARTIN MARIETTA would perpetrate a fraud on plaintiff, would promote injustice, would yield an inequitable result and would constitute an abuse of the corporate privilege in that Transworld secured its contract or contracts with MERKURIY, in derogation of the rights, contracts, and economic relationship SEMTEK had with MERKURIY, and for the benefit of MARTIN MARIETTA, by means of improper payments to Sivirin or Russian officials to positions superior to Sivirin. or by other improper means, all financed and directed, approved, or ratified by MARTIN MARIETTA.

32. MARTIN MARIETTA and URSINI fraudulently misrepresented or concealed certain facts essential to SEMTEK's claims in this complaint, and SEMTEK only first learned of all the essential facts giving rise to a cause of action against those defendants within two years of filing this complaint. In particular, MARTIN MARIETTA falsely represented that it had no financial interest in Transworld and no direct involvement with MERKURIY, and that its only role in the transaction was pursuant to contractual arrangements with Transworld. MARTIN MARIETTA also represented that it had conducted an internal review and that review established that it had not interfered with the SEMTEK/MERKURIY contract. MARTIN MARIETTA also falsely represented that Transworld

had prior rights because Transworld already had a contract with MERKURIY for the next generation Luch Satellite at the time SEMTEK entered its Letter of Intent. Within two years of filing this complaint, SEMTEK has learned that all of these representations were false, and that the true facts were that MARTIN MARIETTA has a controlling financial interest in Transworld and in fact did control Transworld in connection with the latter's transaction with MERKURIY, and that Transworld and MARTIN MARIETTA did not complete a contract with MERKURIY until at least March, 1995, long after initially beginning their interference with SEMTEK's prospective economic advantage by inducing MERKURIY to breach its contract with SEMTEK or inducing MERKURIY to terminate the advantageous economic relationship SEMTEK had with MERKURIY. SEMTEK had no means to discover this information earlier other than from MARTIN MARIETTA and URSINI, and they had refused to disclose those facts.

COUNT ONE

(For Damages for Inducing Breach of Contract)

33. Plaintiff refers to paragraphs 1 to 32, and incorporates each of those paragraphs as if set forth in full at this point.

34. As of no later than May 3. 1993, SEMTEK had a valid and enforceable contract with MERKURIY consisting of the Business Agreement, the Protocol, the agency authorization, and the Letter of Intent, which together contained all essential terms for the formation of a Joint Venture with the exclusive right to sell data transmission services on a commercial basis worldwide. The Joint Venture embodied in these documents related to the next generation of Luch Satellite and to other satellites MERKURIY would assign to the Joint Venture. The protocol also potentially related to the Luch Satellite already in orbit, but that part of the transaction never materialized because Transworld had prior rights to that satellite and the transaction with respect to that satellite was only intended to move forward if Transworld remained in breach of its prior agreement, as it was at the time of the Business Agreement and Protocol. The

Letter of Intent referred to the next generation of satellite as Luch I. MARTIN MARIETTA and URSINI, in their correspondence and other documentation, referred to this next generation of satellite as Loutch II, to denote some additional modifications made by MARTIN MARIETTA to make the satellite conform to its application.

35. The contract between SEMTEK and MERKURIY afforded a high probability of substantial economic benefit to SEMTEK, in that each satellite contains four transponders, and each transponder could produce revenues of up to $2,000,000 per year, and up to three times that amount with compression devices deployed that would enable each transponder to send more than one signal simultaneously. The guaranteed life of the Luch Satellite is three years, but the usual useful life is five years. The contract contemplated two Luch satellites. Anticipated revenues to the Joint Venture thus ranged from $48,000,000 to $80,000,000 depending on the life of the satellite, before application of the compression technology, which could have tripled revenue. The investment required would not exceed $5,000,000, so the contract could have resulted in SEMTEK receiving over $100,000,000 net of expenses over the course of five years.

36. At all times mentioned herein, MARTIN MARIETTA and URSINI were aware of the existence of the contract between SEMTEK and MERKURIY. MARTIN MARIETTA and URSINI also had a desire to obtain some or all of the rights to commercially market the satellite transmission capacity for their own economic benefit.

37. With knowledge of SEMTEK's contract with MERKURIY, MARTIN MARIETTA and URSINI, acting directly or through Transworld, offered economic incentives and other consideration, and made improper payments, to either Sivirin or superiors of Sivirin, or to MERKURIY, for the express purpose of securing for MARTIN MARIETTA or its front company Transworld the rights to commercially market the Luch I Satellite which it knew belonged to SEMTEK, all for the

pecuniary benefit of MARTIN MARIETTA Advanced Development and Technology Operations, which URSINI headed. MARTIN MARIETTA and URSINI, acting directly or through Transworld and Millman, also advised, counseled, and persuaded MERKURIY that it could breach, disavow, or otherwise avoid its contract with SEMTEK by asserting that no contract had been formed, and that the parties had failed to timely form the Joint Venture, when in fact a contract already existed and the time to complete the business plan and formal joint venture document had been extended and had not yet expired. In offering those incentives and other consideration, making those payments, and persuading MERKURIY to take those positions disavowing the contract with SEMTEK, MARTIN MARIETTA and URSINI violated fair and ethical business practices, the MARTIN MARIETTA code of business ethics, and the law. MARTIN MARIETTA and URSINI committed those acts with the specific intent of inducing MERKURIY to breach and disavow its contract with SEMTEK and instead enter into a contract, with Transworld and/or MARTIN MARIETTA. MARTIN MARIETTA intended to interfere with the established relationship between SEMTEK and MERKURIY, and its acts were designed to disrupt that relationship and deprive SEMTEK of the economic benefit of its contract with MERKURIY.

38. The acts of MARTIN MARIETTA and URSINI as described above did in fact induce MERKURIY to breach its contract with SEMTEK and did in fact actually disrupt the economic relationship between SEMTEK and MERKURIY in that on August 8, 1994, MERKURIY faxed to SEMTEK a July 27, 1994 letter informing SEMTEK that no contract existed between them and that the Letter of Intent was not binding, and falsely stating that the parties had failed to timely complete the Joint Venture. MERKURIY instead entered into a contract with Transworld and/or MARTIN MARIETTA, and thereafter refused to continue performing under its contract with SEMTEK.

39. As a direct and proximate result of MARTIN

MARIETTA's and URSINI's inducing MERKURIY to breach its contact with SEMTEK, SEMTEK has suffered damages in the form of loss of income in excess of $100,000,000 from the Luch I Satellite, plus interest thereon according to proof. The Luch I Satellite was only first launched within the last two years, and SEMTEK therefore only suffered its damages commencing within the last two years, as the satellite must be launched before SEMTEK would start receiving income.

40. The acts of MARTIN MARIETTA and URSINI as described above were performed with malice, oppression, fraud and ill will, with an intent to vex, injure, and annoy SEMTEK, and with a conscious disregard of SEMTEK's rights, all of which warrants the imposition of punitive or exemplary damages in an amount to be determined at trial.

COUNT TWO

(For Damages for Intentional Interference With Prospective Economic Advantage)

41. Plaintiff refers to paragraphs 1 to 32, and incorporates each of those paragraphs as if set forth in full at this point.

42. At all times mentioned herein, an economic relationship existed between SEMTEK and MERKURIY whereby those entities would engage in a Joint Venture that would have the exclusive worldwide right to sell data transmission services via the Luch I Satellite on a commercial basis. This economic relationship consisted of the agreements set forth in the Business Agreement, the Protocol, and the Letter of Intent described above, as well as the extensive steps taken by SEMTEK to interview and assemble highly qualified staff, engage the services of an investment banking firm, retain consultants in satellite technology and marketing, prepare a business plan, and participate in meetings, conversations and correspondence with MERKURIY and others concerning the business of the Joint Venture. While the Business Agreement and Protocol related to the Luch Satellite that was in orbit at the time and applied only if Transworld, which had the marketing rights for that satellite,

continued to breach its agreement with MERKURIY as it had at that time, the Letter of Intent applied to the Luch I Satellite to be launched at a then undetermined date in the future. The Luch I Satellite was later referred to as Loutch II in MARTIN MARIETTA correspondence and documents, denoting some additional modifications LOCKHEED MARTIN made for compatibility with its own application. SEMTEK and MERKURIY were progressing toward completion of a final Joint Venture document which would encompass the business plan and set forth their arrangement in greater detail than the Letter of Intent previously signed and would have concluded that arrangement if not for the interference of MARTIN MARIETTA and URSINI.

43. The economic relationship between SEMTEK and MERKURIY afforded a high probability of substantial economic benefit to SEMTEK, in that each satellite contains four transponders, and each transponder could produce revenues of up to $2,000,000 per year, and up to three times that amount with compression devices deployed that would enable each transponder to send more than one signal simultaneously. The guaranteed life of the Luch I Satellite is three years, but the usual useful life is five years. The business plan contemplated two Luch satellites. Anticipated revenues to the Joint Venture thus ranged from $48,000,000 to $80,000,000 depending on the life of the satellite, before application of the compression technology, which could have tripled revenue. The investment required would not exceed $5,000,000, so the contract could have resulted in SEMTEK receiving over $100,000,000 net of expenses over the course of five years.

44. At all times mentioned herein, MARTIN MARIETTA and URSINI were aware of the existence of the advantageous economic relationship between SEMTEK and MERKURIY. MARTIN MARIETTA and URSINI also had a desire to obtain some or all of the rights to commercially market the satellite transmission capacity for their own economic benefit.

45. With knowledge of SEMTEK's advantageous economic

relationship with MERKURIY, MARTIN MARIETTA and URSINI, acting directly or through Transworld, offered economic incentives and other consideration, and made improper payments, to either Sivirin or superiors of Sivirin, or to MERKURIY, for the express purpose of securing for MARTIN MARIETTA or its front company Transworld the rights to commercially market the Luch Satellite which it knew belonged to SEMTEK, all for the pecuniary benefit of MARTIN MARIETTA Advanced Development and Technology Operations, which URSINI headed. MARTIN MARIETTA and URSINI, acting directly or through Transworld and Millman, also advised, counseled, and persuaded MERKURIY that it could disavow, terminate, or otherwise avoid its relationship with SEMTEK by asserting that no contract had been formed, and that the parties had failed to timely form the Joint Venture, when in fact the time to complete the business plan and formal joint venture document had been extended and had not yet expired, and SEMTEK and MERKURIY did have a relationship which, if not disrupted by MARTIN MARIETTA and URSINI, would have resulted in economic benefits for both SEMTEK and MERKURIY. In offering those incentives and other consideration, making those payments, and persuading MERKURIY to take those positions disavowing and terminating its relationship with SEMTEK, MARTIN MARIETTA and URSINI violated fair and ethical business practices, the MARTIN MARIETTA code of business ethics, and the law. MARTIN MARIETTA and URSINI committed those acts with the specific intent of interfering with SEMTEK's advantageous economic relationship with MERKURIY and interfering with SEMTEK's prospective economic advantage. MARTIN MARIETTA's acts were designed to disrupt that relationship and deprive SEMTEK of the economic benefit of its relationship with MERKURIY.

46. The acts of MARTIN MARIETTA and URSINI as described above did in fact actually disrupt the economic relationship between SEMTEK and MERKURIY and did in fact interfere with SEMTEK's prospective economic advantage in

that on August 8, 1994 MERKURIY faxed to SEMTEK a July 27, 1994 letter informing SEMTEK that no contract existed between them and that the Letter of Intent was not binding, and falsely stating that the parties had failed to timely complete the Joint Venture. MERKURIY instead entered into a contract with Transworld and/or MARTIN MARIETTA for the same rights to market commercially the data transmission capacity of the Luch I Satellite, and thereafter refused to continue its relationship with SEMTEK.

47. As a direct and proximate result of MARTIN MARIETTA's and URSINI's interference with SEMTEK's prospective economic advantage, SEMTEK has suffered damages in the form of loss of income in excess of $100,000,000 from the Luch I Satellite, plus interest thereon according to proof. The Luch I Satellite was only first launched within the last two years, and SEMTEK therefore only suffered its damages commencing within the last two years, as the satellite must be launched before SEMTEK would start receiving income.

48. The acts of MARTIN MARIETTA and URSINI as described above were performed with malice, oppression, fraud and ill will, with an intent to vex, injure, and annoy SEMTEK, and with a conscious disregard of SEMTEK's rights, all of which warrants the imposition of punitive or exemplary damages in an amount to be determined at trial.

COUNT THREE

(For Damages for Negligent Interference With Prospective Economic Advantage)

49. Plaintiff refers to paragraphs 1 to 32, and incorporates each of those paragraphs as if set forth in full at this point.

50. At all times mentioned herein, an economic relationship existed between SEMTEK and MERCURIY whereby those entities would engage in a Joint Venture that would have the exclusive worldwide right to sell data transmission services via the Luch I Satellite on a commercial basis. This economic relationship consisted of the agreements set forth in the Business

Agreement, the Protocol, and the Letter of Intent described above, as well as the extensive steps taken by SEMTEK to interview and assemble highly qualified staff, engage the services of an investment banking firm, retain consultants in satellite technology and marketing, prepare a business plan, and participate in meetings, conversations and correspondence with MERKURIY and others concerning the business of the Joint Venture. While the Businesses Agreement and Protocol related to the Luch Satellite that was in orbit at the time and applied only if Transworld, which had the marketing rights for that satellite, continued to breach its agreement with MERKURIY as it had at that time, the Letter of Intent applied to the Luck I Satellite to be launched at a then undetermined date in the future. The Luch I Satellite was later referred to as Loutch II in MARTIN MARIETTA correspondence and documents, denoting some additional modifications LOCKHEED MARTIN made for compatibility with its own application. SEMTEK and MERKURIY were progressing toward completion of a final Joint venture document which would encompass the business plan and set forth their arrangement in greater detail than the Letter of Intent previously signed and would have concluded that arrangement if not for the interference of MARTIN MARIETTA and URSINI.

51. The economic relationship between SEMTEK and MERKURIY was intended to benefit both parties economically and afforded a high probability of substantial economic benefit to SEMTEK, in that each satellite contains four transponders, and each transponder could produce revenues of up to $2,000,000 per year, and up to three times that amount with compression devices deployed that would enable each transponder to send more than one signal simultaneously. The guaranteed life of the Luch Satellite is three years, but the usual useful life is five years. The business plan contemplated two Luch satellites. Anticipated revenues to the Joint Venture thus ranged from $48,000,000 to $80,000,000 depending on the life of the satellite, before application of the compression technology which could have tripled revenue. The investment required

would not exceed $5,000,000, so the contract could have resulted in SEMTEK receiving over $100,000,000 net of expenses over the course of five years.

52. At all times mentioned herein, MARTIN MARIETTA and URSINI were aware of the existence of the advantageous economic relationship between SEMTEK and MERKURIY. MARTIN MARIETTA and URSINI also had a desire to obtain some or all of the rights to commercially market the satellite transmission capacity for their own economic benefit, and knew that if they did not act with due care, their actions is seeking those commercial marketing rights would interfere with the relationship between SEMTEK and MERKURIY, and would cause SEMTEK to lose the probable future economic benefit and prospective economic advantage of its relationship with MERKURIY.

53. With knowledge of SEMTEK's advantageous economic relationship with MERKURIY, MARTIN MARIETTA and URSINI, acting directly or through Transworld, negligently, carelessly, and unlawfully offered economic incentives and other consideration, and made improper payments, to either Sivirin or superiors of Sivirin, or to MERKURIY, for the express purpose of securing for MARTIN MARIETTA or its front company Transworld the rights to commercially market the Luch Satellite which it knew belonged to SEMTEK, all for the pecuniary benefit of MARTIN MARIETTA Advanced Development and Technology Operations, which URSINI headed. MARTIN MARIETTA and URSINI, acting directly or through Transworld and Millman, also negligently, carelessly, and unlawfully advised, counseled, and persuaded MERKURIY that it could disavow, terminate, or otherwise avoid its relationship with SEMTEK by asserting that no contract had been formed, and that the parties had failed to timely form the Joint Venture, when in fact the time to complete the business plan and formal joint venture document had been extended and had not yet expired, and SEMTEK and MERKURIY did have a relationship which, if not disrupted by MARTIN MARIETTA and URSINI, would

have resulted in economic benefits for both SEMTEK and MERKURIY. In offering those incentives and other consideration, making those payments, and persuading MERKURIY to take those positions disavowing and terminating its relationship with SEMTEK, MARTIN MARIETTA and URSINI violated fair and ethical business practices, the MARTIN MARIETTA code of business ethics, and the law. In committing those acts, MARTIN MARIETTA and URSINI negligently, carelessly, and unlawfully interfered with SEMTEK's advantageous economic relationship with MERKURIY and interfered with SEMTEK's prospective economic advantage.

54. The interference with SEMTEK's advantageous economic relationship with MERKURIY that MARTIN MARIETTA and URSINI would cause was foreseeable to MARTIN MARIETTA and URSINI because MARTIN MARIETTA and URSINI at all relevant times knew about the relationship and joint venture between SEMTEK and MERKURIY, and knew that the commercial marketing rights they were seeking were the same as those rights that were the subject of the SEMTEK/MERKURIY Joint Venture. Because only one entity could have exclusive marketing rights, and because MARTIN MARIETTA and URSINI refused to consider a cooperative venture that would include SEMTEK, the injury to SEMTEK from the acts of MARTIN MARIETTA and URSINI was virtually certain to occur once the Luch Satellite capacity was marketed and the Satellite itself was launched.

55. The acts of MARTIN MARIETTA and URSINI as described above did in fact actually and directly disrupt the economic relationship between SEMTEK and MERKURIY and did in fact interfere with SEMTEK's prospective economic advantage in that on August 8, 1994, MERKURIY faxed to SEMTEK a July 27, 1994 letter informing SEMTEK that no contract existed between them and that the Letter of Intent was not binding, and falsely stating that the parties had failed to timely complete the Joint Venture. MERKURIY instead entered

into a contract with Transworld and/or MARTIN MARIETTA for the same rights to market commercially the data transmission capacity of the Luch I Satellite, and thereafter refused to continue its relationship with SEMTEK.

56. MARTIN MARIETTA and URSINI persisted in their actions interfering with the SEMTEK/MERKURIY relationship even after they were aware of that relationship, after SEMTEK notified them that their actions were interfering with that relationship, and after SEMTEK made its agreements available for the review of MARTIN MARIETTA's general counsel. Unless an award of damages is made in this case, LOCKHEED MARTIN as Successor to MARTIN MARIETTA will continue using wrongful means to interfere with smaller United States companies attempting to engage in international commerce in the satellite communications field and in other fields as well.

57. As a direct and proximate result of MARTIN MARIETTA's and URSINI's negligent interference with SEMTEK's prospective economic advantage, SEMTEK has suffered damages in the form of loss of income in excess of $100,000,000 from the Luch I Satellite, plus interest thereon according to proof. The Luch I Satellite was only first launched within the last two years, and SEMTEK therefore only suffered its damages commencing within the last two years, as the satellite must be launched before SEMTEK would start receiving income.

COUNT FOUR

(For Damages for Conspiracy to Interfere With Prospective Economic Advantage)

58. Plaintiff refers to paragraphs 1 to 32, and 42 to 47, and incorporates each of those paragraphs as if set forth in full at this point.

59. Prior to the events described above, MARTIN MARIETTA, acting through URSINI, entered into a plan, scheme, and conspiracy with Transworld to interfere with SEMTEK's advantageous economic relationship with

MERKURIY by making improper or unlawful payments or by other improper or unlawful means, and to capture for themselves the right to market the data transmission capabilities of the Luch I Satellite. As part of that plan, scheme, and conspiracy, all payments would be channeled through Transworld but would actually originate with MARTIN MARIETTA, and Transworld would be the contracting party with MERKURIY, even though MARTIN MARIETTA was fully funding Transworld and would receive the financial benefit of the transaction, in order to try to insulate MARTIN MARIETTA from any liability herein and from any liability for any payments made to Russian officials.

60. Pursuant to that conspiracy, MARTIN MARIETTA and URSINI, acting with and in some cases through Transworld, committed all of the acts of interference described above. To further the purposes of the conspiracy, Transworld entered into contracts with MERKURIY for the marketing of the satellite capacity and with MARTIN MARIETTA for the funding, but Transworld itself lacks the financial wherewithal to perform on any of those contracts independently of MARTIN MARIETTA, and was merely a front company for MARTIN MARIETTA in entering those contracts. MARTIN MARIETTA at all times retained ultimate decision-making authority in connection with all activities performed pursuant to the conspiracy as described above.

61. As a direct and proximate result of MARTIN MARIETTA's and URSINI's conspiracy with Transworld to interfere with SEMTEK's prospective economic advantage, and the actions taken pursuant to that conspiracy, SEMTEK has suffered damages in the form of loss of income in excess of $100,000,000 from the Luch I Satellite, plus interest thereon according to proof. The Luch I Satellite was only first launched within the last two years, and SEMTEK therefore only suffered its damages commencing within the last two years, as the satellite must be launched before SEMTEK would start receiving income.

62. The acts of MARTIN MARIETTA and URSINI as

described above were performed with malice, oppression, fraud and ill will, with an intent to vex, injure, and annoy SEMTEK, and with a conscious disregard of SEMTEK's rights, all of which warrants the imposition of punitive or exemplary damages in an amount to be determined at trial.

WHEREFORE, Plaintiff prays for judgment against defendants, and each of them, as follows:

1. For compensatory damages in the sum of at least $100,000,000.

2. For pre-judgment interest thereon according to proof.

3. For punitive or exemplary damages in an amount to be proven at the time of trial.

4. For costs of suit incurred herein.

5. For such further relief as the Court deems just and proper.

DATED: _____
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(4)

No. 99-1551

Supreme Court, U.S.
FILED
AUG 2 5 2000
CLERK

IN THE
Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS
OF MARYLAND

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In a suit by petitioner against respondent in California state court, respondent removed the case to federal court on the basis of diversity jurisdiction and obtained a dismissal on the ground that the California statute of limitations had run. Petitioner then brought the present suit against respondent in state court in Maryland – a state whose relevant statute of limitations had not yet run. Rejecting petitioner's argument that this Court's decisions (especially *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874), and *Hancock National Bank v. Farnum*, 176 U.S. 640, 644-45 (1900)), required the Maryland court to follow California preclusion law (which would not impose a res judicata bar to the Maryland action), the Maryland state courts looked only to federal law and interpreted that law as requiring dismissal of the action on the basis of res judicata. The questions presented are:

1. Is this Court's holding in *Dupasseur* – that the res judicata effect of the judgment of a federal court sitting in diversity "is such as would belong to judgments of the State courts rendered under similar circumstances," and that "no higher sanctity or effect can be claimed," 88 U.S. at 135 – still good law?

2. If *Dupasseur* is overruled or modified by this Court, what should be the res judicata effect of a statute-of-limitations dismissal in a federal court diversity suit?

RULE 29.6 STATEMENT

Petitioner Semtek International Incorporated has no parent corporation and no publicly held company owns any of its stock. Semtek International Incorporated has now merged into Semtek International Corporation, a New Jersey corporation.

TABLE OF CONTENTS

Question Presented i
Rule 29.6 Statement ii
Table of Contents iii
Table of Authorities iv
Brief for the Petitioner 1
Opinions Below 1
Jurisdiction 1
Constitutional and Statutory and Rule Provisions Involved 1
Statement 1
1. The California Action 2
2. The Maryland Action 5
3. The Decision Below 8
Summary of Argument 8
Argument 10
I. The Law of the Forum State Controls the Preclusive Effect of a Federal Diversity Judgment 10
A. *Dupasseur* Should be Reaffirmed as a Matter of Stare Decisis 11
B. The Rule of *Dupasseur* is Correct 15
1. *Dupasseur* respects state policy choices concerning res judicata 16
2. *Dupasseur* avoids forum shopping and the inequitable administration of state law 19
3. *Dupasseur* respects the interests of the second forum state 22
4. *Dupasseur* respects the interests of the first forum state 24
5. There is no federal interest that would warrant departing from *Dupasseur* 25

II. Even if *Dupasseur* Does Not Control, Federal Law Should Provide that a Statute of Limitations Dismissal by a Federal Diversity Court Generally Does Not Bar a Subsequent Action in Another State .. 28
A. Federal Law Would Borrow the Rule of the Forum State 28
B. If This Court Sets a Uniform Rule, It Should Adopt the Overwhelming Majority Rule that a Statute-of-Limitations Dismissal Does Not Preclude Suit in Another Forum 33
III. Rule 41(b) Does Not Require a Contrary Result 34
A. Rule 41(b) Should Not Be Read as Deciding the Issue of the Preclusive Effect to Which Federal Diversity Judgments are Entitled 34
B. Rule 41(b) Does Not Accord Preclusive Effect to a Statute-of-Limitations Dismissal 44
Conclusion 50

TABLE OF AUTHORITIES

Cases: **Page**

Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) 30
Alden v. Maine, 527 U.S. 706 (1999) 25
American States Ins. Co. v. Walker, 477 S.E.2d 360 (Ga. App. 1996) 18
Amsterdam Sav. Bank v. Marine Midland Bank, 528 N.Y.S.2d 184 (App. Div. 1988) 18
Angel v. Bullington, 330 U.S. 183 (1947) 16, 22, 24
Angstadt v. Atlantic Mut. Ins. Co., 457 S.E.2d 86 (Va. 1995) 17
Ankenbrandt v. Richards, 504 U.S. 689 (1992) 15
Apparel Art Int'l, Inc. v. Amertex Enters. Ltd., 48 F.3d 576 (CA1 1995) 18
Arab African Int'l Bank v. Epstein, 958 F.2d 532 (CA3 1992) 17
Atherton v. FDIC, 519 U.S. 213 (1997) 31, 32
Baker Elec. Coop. v. Chaske, 28 F.3d 1466 (CA8 1994) .. 17
Baker v. General Motors Corp., 522 U.S. 222 (1998) 10
Barber v. Barber, 21 How. 582 (1859) 15
Baris v. Sulpicio Lines, 74 F.3d 567 (CA5 1996) 39
Bauserman v. Blunt, 147 U.S. 647 (1893) 33
Benetton S.p.A. v. Benedot, Inc., 642 So. 2d 394 (Ala. 1994) 18
Blonder-Tongue Labs. v. University of Ill. Found., 402 U.S. 313 (1971) 13, 17
Board of County Commr's v. United States, 308 U.S. 343 (1939) 32
Brye v. Brakebush, 32 F.3d 1179, 1185 & n.7 (CA7 1994) 39
Buie v. Waters, 74 S.E.2d 883 (Ga. 1953) 18
Burgess v. Cohen, 593 F. Supp. 1122, 1124 (E.D. Va. 1984) 47

Cases (continued): **Page**

Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) . . 15
Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958) 38
Campbell v. Haverhill, 155 U.S. 610 (1895) 30
Cashelmara Villas, Ltd. Partnership v. DiBenedetto, 623 N.E.2d 213 (Ohio App. 1993) 17
Chau v. City of Seattle, 802 P.2d 822 (Wash. App. 1990) 18
Colonial Auto Ctr. v. Tomlin, 105 F.3d 933 (CA4 1997) 39
Columbia Cas. Co. v. Playtex FP, Inc., 584 A.2d 1214 (Del. 1991) 19
Commissioner v. Sunnen, 333 U.S. 591, 597 (1948) 43
Costello v. United States, 365 U.S. 265 (1961) . . . . . passim
Criales v. American Airlines, 105 F.3d 93 (CA2 1997) . . . 49
Cromwell v. County of Sac, 94 U.S. 351 (1877) 43
D'Angelo v. City of New York, 929 F. Supp. 129 (S.D.N.Y. 1996) 40
DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983) 30
Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1874) . . . . . passim
Embry v. Palmer, 107 U.S. 3 (1882) 14
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) . . . 20, 21, 29
Federated Dep't Stores v. Moitie, 452 U.S. 394 (1981) 16, 43
Ferens v. John Deere Co., 494 U.S. 516 (1990) 20, 30
Gagnon Co. v. Nevada Desert Inn, 45 Cal. 2d 448, 289 P.2d 466 (1955) 27
Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) 16, 20, 38
Goddard v. Security Title Ins. & Guar. Co., 92 P.2d 804 (Cal. 1939) 6, 28

Cases (continued): **Page**

Gottlob v. Connecticut State Univ., No. CV 930521148S, 1996 WL 57087 (Conn. Super. Ct. Jan. 19, 1996) 18
Grider v. USX Corp., 847 P.2d 779 (Okla. 1993) 18
Guaranty Trust Co. v. York, 326 U.S. 99 (1945) . . . . . passim
H. Christiansen & Sons, Inc. v. City of Duluth, 31 N.W.2d 277 (Minn. 1948) 18
Hacker v. Beck, 91 N.E.2d 832 (Mass. 1950) 18
Haldeman v. United States, 91 U.S. 584 (1875) 46
Hancock National Bank v. Farnum, 176 U.S. 640 (1900) 12, 14
Hanna v. Plumer, 380 U.S. 460 (1965) 21, 38, 42
Harris v. Amoco Prod. Co., 768 F.2d 669 (CA5 1985) 49
Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294 (1917) 16
Hauch v. Conner, 453 A.2d 1207 (Md. 1983) 23
Heck v. Humphrey, 512 U.S. 477 (1994) 13, 38
Heiser v. Woodruff, 327 U.S. 726 (1946) 12, 21
Hilton v. South Carolina Public Railways Comm'n, 502 U.S. 197 (1991) 14
Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380 (N.D. 1992) 17
Hohn v. United States, 524 U.S. 236 (1998) 14
Holmberg v. Armbrecht, 327 U.S. 392 21
Hughes v. United States 71 U.S. (4 Wall.) 232 (1866) 46
Hunt v. Liberty Lobby, Inc., 707 F.2d 1493 (CADC 1983) 17
In re Casse, 198 F.3d 327 (CA2 1999) 39
In re Estate of Cochrane, 391 N.E.2d 35 (Ill. App. 1979) 18
In re Swine Flu Immuniz. Prods. Liab. Litig., 880 F.2d 1439 (CADC 1989) 48

Cases (continued): **Page**

In re Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31 (D.D.C. 2000) 26
International Union v. Hossier Cardinal Corp., 383 U.S. 696 (1966) 30, 32
Iowa Coal Mining Co. v. Monroe County, 555 N.W.2d 418 (Iowa 1996) 18
Jones v. Blanton, 644 So. 2d 882 (Ala. 1994) 17
Kanarek v. Bugliosi, 166 Cal. Rptr. 526 (App. 1980) 18
Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 26, 30
Knights of Pythias v. Meyer, 265 U.S. 30 (1924) 13
Knox v. Lichtenstein, 654 F.2d 19 (CA8 1981) 49
Koch v. Rodlin Enters., 223 Cal. App. 3d 1591 (1990) .. 6, 50
Kulinski v. Medtronic Bio-Medicus, Inc., 108 F.3d 904 (CA8 1997) 39
Lackner v. LaCroix, 602 P.2d 393 (Cal. 1979) 6, 50
Magnus Elecs., Inc. v. La Republica Argentina, 830 F.2d 1396 (CA7 1987) 17
Mallow v. Hinde, 12 Wheat. (25 U.S.) 193 (1827) 47
Marathon Oil Co. v. Babbitt, 938 F. Supp. 575 (D. Alaska 1996) 17
Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 24
McBurney v. Aldrich, 816 S.W.2d 30 (Tenn. App. 1991) 18
McCarney v. Ford Motor Co., 657 F.2d 230 (CA8 1981) .. 49
McDermott v. Kansas Pub. Serv. Co., 712 P.2d 1199 (Kan. 1986) 17
Metcalf v. City of Watertown, 153 U.S. 671 (1894) ... 12, 14
Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946) 48
Montana v. United States, 440 U.S. 147 (1979) 27

Cases (continued): **Page**

Nealey v. Transportacion Maritima Mexicana, S.A., 662 F.2d 1275 (CA9 1980) 37
New York v. United States, 505 U.S. 144 (1992) 25
O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) . 29, 31, 32
Olsen v. Breeze, Inc., 55 Cal. Rptr. 2d 818 (App. 1996) 18
Pack v. Yusuff, No. 99-60283, 2000 U.S. App. LEXIS 15843 (5th Cir. July 10, 2000) 49
Palmer v. Hoffman, 318 U.S. 109 (1943) 39
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 30
Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986) 10
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) .. 15
Payne v. Tennessee, 501 U.S. 808 (1991) 14
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 14
Postal Tel. Cable Co. v. City of Newport, Ky., 247 U.S. 464 (1918) 16
PRC Harris, Inc. v. Boeing Co., 700 F.2d 894 (CA2 1983) 42
Printz v. United States, 521 U.S. 898 (1997) 25
Rader v. Baltimore & O.R. Co., 108 F.2d 980 (CA7), cert. denied, 309 U.S. 682 (1940) 36
Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949) 20, 38
Reinke v. Boden, 45 F.3d 166 (CA7 1995) 37, 39
Richards v. Jefferson County, Ala., 517 U.S. 793 (1996) 15, 16
Ritchey v. Upjohn Drug Co., 139 F.3d 1313 (CA9), cert. denied, 525 U.S. 963 (1998) 28
Rivet v. Regions Bank, 522 U.S. 470 (1998) 7, 25
Sack v. Low, 478 F.2d 360 (CA2 1973) 42, 49
Schiavone v. Fortune, 477 U.S. 21 (1986) 48
Semler v. Psychiatric Inst. of Washington, D.C., Inc., 575 F.2d 922 (CADC 1978) 29

Cases (continued): **Page**

Semtek Int'l v. Lockheed Martin Corp., 988 F. Supp. 913 (D. Md. 1997) 6
Shoup v. Bell & Howell Co., 872 F.2d 1178 (CA4 1989) 30
Smith v. Gray Concrete Pipe Co., 297 A.2d 721 (Md. 1972) 18
Southern Ry. Co. v. Clift, 260 U.S. 316 (1922) 44
Stogniew v. McQueen, 656 So. 2d 917 (Fla. 1995) 17
Stoll v. Gottlieb, 305 U.S. 165 (1938) 14
Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) 14, 34, 39
Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) 13
Takahashi v. Board of Educ., 249 Cal. Rptr. 578 (App. 1988) 18
Torcasso v. Standard Outdoor Sales, Inc., 626 N.E.2d 225 (Ill. 1993) 18
Torres v. Oakland Scavenger Corp., 487 U.S. 312 (1988) 48
Townsend v. Jemison, 50 U.S. (9 Cranch) 407 (1850) 34
Turner v. Yamaha Motor Corp., U.S.A., 591 A.2d 886 (1991) 6
Union & Planters Bank of Memphis v. Memphis, 189 U.S. 71 (1903) 24
Union Nat'l Bank v. Lamb, 337 U.S. 38 (1949) 34
United States v. Donnally, 33 U.S. (8 Pet.) 361 (1834) 34
United States v. Gaubert, 499 U.S. 315 (1991) 2
United States v. Kimbell Foods, 440 U.S. 715 (1979) 31, 32
United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) 31
United States v. United States Smelting Refining & Mining Co., 339 U.S. 186 (1950) 43
United States v. Yazell, 382 U.S. 341 (1966) 32
Vanover v. Kansas City Life Ins. Co., 438 N.W.2d 524 (N.D. 1989) 17

Cases (continued): **Page**

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 20, 21, 30, 38
Walker v. Kerr-McGee Chem. Corp., 793 F. Supp. 688 (N.D. Miss. 1992) 17
Weissenger v. United States, 423 F.2d 795, 799 (CA5 1970) (en banc) 40, 42
Western Coal & Min. Corp. v. Jones, 167 P.2d 719 (1946) 48
Wheeldin v. Wheeler, 373 U.S. 647 (1963) 31
Wilson v. Garcia, 471 U.S. 261 (1985) 33
Wong Doo v. United States, 265 U.S. 239 (1924) 43

Constitutional Provisions and Statutes: **Page**

Full Faith and Credit Clause, Art. IV, § 1 ..... 1, 10
28 U.S.C. § 1257(a) 1
28 U.S.C. § 1404a 20
28 U.S.C. § 1441(b) 3
28 U.S.C. § 1651(a) 7
Full Faith and Credit Act, 28 U.S.C. § 1738 ..... passim
Conformity Act of 1872, Ch. 255, 17 Stat. 196 13
Rules Enabling Act, 28 U.S.C. § 2072 ..... 34, 36, 42
Rules of Decision Act, 28 U.S.C. § 1652 ..... 1, 16
Ga. Code Ann. § 9-12-19 (1993) 17
Ga. Code Ann. § 9-12-40 (1993) 17
La. Rev. Stat. Ann. § 13:4231 16
Md. Cts. & Jud. Proc. Code Ann. § 5-101 6
Md. Cts. & Jud. Proc. Code Ann. § 5-115(b) 23

Rules: **Page**

FRCP 1 36
FRCP 3 38
FRCP 6(e) 5
FRCP 8(c) 38

Rules (continued): **Page**

FRCP 23, Advisory Committee Notes 26
FRCP 41(a)(2) 40
FRCP 41(b) . . . . . passim
FRCP 58 4
FRCP 60(a) 7
FRCP 60(b)(6) 7
FRCP 82 36
Local Rule 14.6 of the U.S. District Court for the Central District of California 4
Local Rule 14.7 of the U.S. District Court for the Central District of California 4
Md. Rule of Court 2-101(b) 23
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Restatement (Second) of Judgments (1982) 17, 30, 36
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Maryland circuit court dismissing petitioner's suit on the basis of res judicata, App. 36a-47a, is unreported. The decision of the Maryland Court of Special Appeals, App. 1a-34a, affirming the trial court is reported at 736 A.2d 1104. The order of the Maryland Court of Appeals denying review, App. 35a, is unreported.

JURISDICTION

The Maryland Court of Special Appeals entered a final judgment affirming the state circuit court's order of dismissal on September 7, 1999. The Maryland Court of Appeals denied Semtek's timely state-court petition for discretionary review on December 21, 1999. This Court granted Semtek's timely petition for a writ of certiorari on June 26, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Full Faith and Credit Clause, Art. IV, § 1, the Full Faith and Credit Act, 28 U.S.C. § 1738, the Rules of Decision Act, 28 U.S.C. § 1652, and Fed. R. Civ. P. 41(b) are set out in the Addendum to this brief.

STATEMENT

Petitioner Semtek International Incorporated ("Semtek") brought this lawsuit against respondent Lockheed Martin Corporation ("Lockheed") in Maryland state court alleging various torts, none of which arises under federal law. The suit was timely under Maryland's three-year statute of limitations. The question presented is whether Semtek's suit is barred by res judicata because a federal district court sitting in diversity in

California previously dismissed, under California's two-year statute of limitations, a different suit brought by Semtek against Lockheed. Under both California and Maryland law, Semtek's Maryland suit is not barred by res judicata, and under precedents of this Court that have been settled for more than a century, it makes no difference that a federal district court rather than a California state court dismissed the California action. The judgment below accordingly should be reversed.

1. The California Action.

a. Semtek was formed in 1992 to contract with emerging Russian enterprises, particularly with respect to satellite ventures.[1] Between late 1992 and early 1993, Semtek entered into various agreements with Merkuriy, Ltd., which had been licensed by the Russian Space Agency, with the approval of the Russian Defense Ministry, to contract for the commercial use of Russian satellites, culminating in a joint venture for the financing, development, and use of Russian satellite telecommunication services. App. 49a. In July 1994, Merkuriy informed Semtek that the joint venture might be in jeopardy as a result of the involvement of Martin Marietta Technologies, Inc. ("Martin Marietta"), and a third party. App. 50a. Semtek then contacted a representative of Martin Marietta, Samuel M. Ursini, and the president of the third party, Transworld Communications ("Transworld"), advising them of Semtek's relationship with Merkuriy. App. 51a. On August 8, 1994, Merkuriy informed Semtek that it would not proceed with the joint venture. Merkuriy subsequently contracted with Martin Marietta and Transworld to provide the services contemplated by its joint venture with Semtek. App. 52a.

b. In February 1997, Semtek sued Lockheed (Martin

[1] The description of the parties' relationship is summarized from the allegations of Semtek's Maryland complaint, which for purposes of these proceedings must be accepted as true. *United States v. Gaubert*, 499 U.S. 315, 327 (1991). For a more detailed description of the complaint's allegations, see App. 49a-52a.

Marietta's successor in interest) and Ursini in California state court alleging business torts arising from the defendants' wrongful conduct (hereinafter "the California action"). App. 2a. Because Ursini was a California resident (Complaint ¶ 4), there was no evident basis for removal. But before Semtek formally served the defendants, Lockheed learned of the suit and immediately removed to federal district court on the ground that Ursini was not yet formally a party. *See* 28 U.S.C. § 1441(b). Semtek filed a motion to remand to state court, which the district court subsequently denied. App. 61a.

Seven days after removing the case, Lockheed moved in the district court to dismiss on a single ground: California's statute of limitations. As Lockheed has explained in its brief in opposition in this Court ("BIO"), "Semtek's own complaint and representations established that California's two-year statute of limitations had expired." BIO 2. Thus, Lockheed's motion was presented to, and considered by, the district court before any factual development in the case and without regard to the merits of Semtek's claims. Notably, Lockheed did not request that the district court enter an order of dismissal that would carry greater preclusive effect than an equivalent order entered by a state court.

The district court granted Lockheed's motion to dismiss, concluding that "California courts have held that the two-year statute of limitations" applies to the causes of action alleged by Semtek. App. 54a (collecting cases). According to the court, "the Complaint reveals that, as early as July 5, 1994, Plaintiff was notified that its prospective joint venture could be in jeopardy due to the involvement of Martin Marietta and Transworld" as well as that "in July 1994, Plaintiff was also aware of Martin Marietta's (and, therefore, Ursini's) potential liability for interference with Plaintiff's prospective business relationship with Merkuriy" and that "its agreement with Merkuriy was breached on August 8, 1994." *Id.* 55a-56a. Furthermore, Semtek's "Complaint fails to state a viable basis for tolling of the statute." *Id.* 57a. Thus, the suit "could not have

accrued any later than August 8, 1994, the date of the admitted breach," such that the California statute of limitations expired in August 1996, approximately seven months before Semtek filed the California action.

c. In many instances, when a district court dismisses an action as inadequately pleaded, it will grant the plaintiff the opportunity to amend or to file a new action containing sufficient allegations. Here, however, the district court declined to follow such a course because of its conclusion that the pleadings definitively established that Semtek could not state a claim under California law. On May 5, 1997, the California district court granted the motion to dismiss and issued a dismissal order that provided in relevant part:

> According to the allegations of Plaintiff's Complaint, the two-year statute of limitations could not have been tolled by fraudulent concealment. The applicable statute of limitations bars this action in its entirety. Accordingly, [plaintiff's Complaint] must be DISMISSED WITH PREJUDICE because, given the allegations in the Complaint, amendment would be futile (Plaintiff cannot plead around or contradict its current allegations).

App. 58a.

On May 7, 1997, without being directed to do so by the district court,[2] Lockheed lodged with the court a proposed judgment purporting to effectuate the dismissal order. Lockheed's proposed judgment included language specifying that the dismissal was "on the merits" – language not used in the dismissal order. The proposed judgment was mail-served on May 7, 1997 and was not received by Semtek until May 8.

On May 8, 1997, without affording Semtek any opportunity

[2] *Compare* Fed. R. Civ. P. 58 ("Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.").

to object to the proposed judgment,[3] the California district court entered the judgment with the extraneous language inserted by Lockheed. App. 59a. The judgment thus provided that "the action be dismissed in its entirety on the merits and with prejudice." *Id.* The district court did not indicate that its judgment would have any res judicata effect different from that of an equivalent judgment entered by a California state court.

On Semtek's appeal, the Ninth Circuit affirmed the district court's judgment. No. 97-55840, 1999 U.S. App. LEXIS 3150 (CA9 Feb. 25, 1999) (unpublished).

2. The Maryland Action.

a. "[A]dditional investigation by Semtek revealed that much of the alleged tortious conduct occurred in Maryland," App. 37a, where Lockheed is headquartered. App. 4a n.1. On July 2, 1997, Semtek filed suit against Lockheed in Maryland state court. App. 3a, 62a.

This second lawsuit is timely under Maryland's three-year statute of limitations. App. 37a, 62a & n.2. See BIO 4 (not disputing timeliness of the Maryland case for purposes of proceedings in this Court).

b. California law would permit the second lawsuit to proceed. California follows the majority rule, under which a statute-of-limitations dismissal ordinarily does not preclude suit in a different jurisdiction where it is timely under the relevant limitations period. Restatement (Second) of the Conflict of Laws §§ 142, 143 (1971); *id.* § 142 (rev. 1989). "[E]ach state determines for itself when a claim becomes stale. Hence maintenance of an action in the state of the forum is not ordinarily precluded by the fact that it is barred by the statute of limitations of another state . . . ." § 142, cmt. g.

Lockheed acknowledges that "California res judicata law . . . does not treat limitations dismissals as judgments on the merits

[3] *Compare* Local Rules 14.6 and 14.7 of the U.S. District Court for the Central District of California; Fed. R. Civ. P. 6(e) (together providing for the filing of objections within eight days after service).

with claim preclusive effect." BIO 18. Although California applies an unusually short two-year statute of limitations for business torts, it has provided that a dismissal on the basis of its limitations period will not preclude another state from applying a longer statute of limitations. Thus, under California law, the dismissal did not bar Semtek from suing Lockheed in another state that has adopted a longer statute of limitations if the other state would permit such a suit. *E.g.*, *Koch* v. *Rodlin Enters., Inc.*, 223 Cal. App.3d 1591, 1595-96 (1990); *see also Lackner* v. *LaCroix*, 602 P.2d 393, 395 (Cal. 1979); *Goddard* v. *Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806 (Cal. 1939).

The fact that, under the common law rule adopted by California, a statute-of-limitations dismissal is not res judicata in a second suit in another state with a longer limitations period does not necessarily mean that the second suit will be allowed to proceed. The second state may elect to "borrow" the statute of limitations of the first. Restatement (Second) of the Conflict of Laws § 142(1) & cmt. f (1971); § 142 & cmt. b (Rev. 1989). Maryland, however, has determined not to borrow the statute of limitations of a sister state in a business tort suit such as that filed by Semtek against Lockheed. *E.g.*, *Turner* v. *Yamaha Motor Corp., U.S.A.*, 591 A.2d 886 (1991). Instead, under Maryland law, such a suit if brought in Maryland is governed by Maryland's three-year statute of limitations. Md. Cts. & Jud. Proc. Code Ann. § 5-101 ("A civil action at law shall be filed within three years of the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced."); *accord* BIO 3 ("Relevant Maryland law provided for a three-year statute of limitations.").

c. Lockheed twice turned to the federal courts in failed efforts to block the Maryland action. Lockheed first unsuccessfully attempted to remove the case to the district court for the district of Maryland. The district court, rejecting Lockheed's argument that a federal defense is a basis for removal, remanded the case to Maryland state court. *Semtek Int'l v. Lockheed Martin Corp.*, 988 F. Supp. 913 (D. Md. 1997);

accord Rivet v. Regions Bank, 522 U.S. 470 (1998) (so holding).

Lockheed also unsuccessfully moved in the California district court to enjoin the Maryland action under the All Writs Act, 28 U.S.C. § 1651(a). The district court denied Lockheed's motion. While cautioning that its statements were dicta, App. 71a n.17, the court reiterated that its prior decision had rested on the California statute of limitations and "did not reach the substantive merits of Plaintiff's tort claims." App. 71a. Furthermore, because Semtek's filing of the Maryland action was not in any sense "vexatious" or "patently without merit," the district court concluded it would be inappropriate to deprive the Maryland courts of the opportunity to resolve the question whether the judgment in the California action was res judicata. *Id.* Accordingly, the California district court concluded that it would not bar "another proper forum" from "afford[ing] Plaintiff the opportunity to fully litigate the merits of its causes of action" if that forum would not apply "a statutory or res judicata bar." *Id.* Indeed, the district court opined that "it is not obvious to this Court that res judicata applies to bar Plaintiff's action in Maryland state court." *Id.* at 71a n.17.[4]

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[4] After the California district court refused to grant Lockheed's motion for an injunction and opined that the dismissal "did not reach the substantive merits of Plaintiff's tort claims," App. 71a, Semtek applied to the Ninth Circuit for a limited remand to file motions in the California district court formally to amend the judgment under Fed. R. Civ. P. 60(a) governing clerical errors and Fed. R. Civ. P. 60(b)(6) allowing for extraordinary relief. Semtek sought a further order to confirm the California district court's dicta (App. 71a n.17) that the dismissal had not reached the substantive merits of the case and that the judgment was without prejudice to Semtek's suing Lockheed in another forum. Without prejudice, the Ninth Circuit denied Semtek leave to file the Rule 60(b)(6) motion. The Ninth Circuit requires that the trial court first indicate that it will entertain a motion to amend an appealed judgment under Rule 60(b)(6) before the Ninth Circuit will issue a limited remand allowing the motion to be heard. Record Excerpts 590. But the Ninth Circuit did not rule on Semtek's request for leave to seek Rule 60(a) relief. Semtek then returned to the California district court, requesting it to indicate its willingness to entertain the motion to amend, but the court declined to hear the

3. The Decision Below.

With the case returned to the Maryland state court, Lockheed moved to dismiss on the basis of res judicata. *Accord* BIO 4 ("[F]or purposes of its motion to dismiss, Lockheed argued only that the California district court's dismissal precluded Semtek from filing the same claim in Maryland."). Lockheed asserted that the judgment in the California action had res judicata effect as a result of Federal Rule of Civil Procedure 41(b). In particular, Lockheed contended that the California judgment was "upon the merits" not merely in the sense provided by California law but also in the far more expansive sense of precluding Semtek's claims in another jurisdiction.

The Maryland trial court agreed with Lockheed that the dismissal of the California action was res judicata as a matter of federal law under "[t]he plain language of" Fed. R. Civ. P. 41(b). App. 38a-39a.

On appeal, Semtek urged the Maryland courts to follow *Dupasseur* v. *Rochereau*, 88 U.S. (21 Wall.) 130, 135 (1874). However, the Maryland Special Court of Appeals affirmed the dismissal, App. 1a-34a, and the Maryland Court of Appeals subsequently denied review, *id.* 35a.

SUMMARY OF ARGUMENT

I. In *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), this Court held that the res judicata effect of a federal diversity judgment "is such as would belong to judgments of the State courts rendered under similar circumstances." *Id.* at 135. During the ensuing century and a quarter, this Court has repeatedly reaffirmed *Dupasseur* and has never disavowed it. *Dupasseur* was built on a statutory jurisdictional framework that

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Rule 60(b)(6) motion. Record Excerpts at 671. In dicta, the California district court noted that it would have denied the Rule 60(b)(6) motion as untimely.

has remained unchanged. This Court should continue to adhere to *Dupasseur* as a matter of stare decisis. *Dupasseur* has proven to be a workable and reliable rule of judicial administration. In addition, *Dupasseur* promotes important values of federalism because it ensures that federal diversity courts will not run roughshod over the deliberate policy choices made by states regarding their respective laws of preclusion. *Dupasseur* reduces incentives for forum-shopping and avoids inequitable administration of the laws.

II. If this Court concludes, contrary to *Dupasseur*, that federal law rather than state law governs the res judicata effect of a limitations dismissal in diversity, the judgment below should nonetheless be reversed. This Court should rule that there is no important federal interest dictating the use of a nationally uniform rule governing the effect of a statute-of-limitations dismissal. Instead, as this Court has done with respect to other issues involving federal litigation of state-law claims where no federal statute or rule is explicitly controlling, this Court should hold that the federal common law rule here is one that *borrows* the pertinent state-law res judicata rule that would have applied if the case had been brought in, or had remained in, state court. Alternatively, this Court could adopt a uniform federal rule providing that a statute-of-limitations dismissal in a diversity case does not preclude suit in another forum with a longer limitations period, a rule mirroring state law in the vast majority of jurisdictions.

III. Federal Rule 41(b) does not require a contrary result. The Rule should not be interpreted as deciding the issue of the preclusive effect to which federal diversity judgments are entitled. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 4441, at 372-73 (1981 & 2000 Supp.) ("Wright & Miller"). Lockheed's interpretation of Rule 41(b) would allow each district court, in the exercise of its own discretion, to prescribe the preclusive effect of its own judgments. Far from achieving uniformity, Lockheed's proposed approach would only breed

uncertainty, contrary to the principles of sound judicial administration and consistency that underlie the rules of civil procedure and the doctrine of res judicata.

Even if, as a general matter, Rule 41(b) governed the preclusive effect of a dismissal order, Rule 41(b) does not accord preclusive effect to the *type* of dismissal entered in this case: a dismissal under a statute of limitations. Controlling here is *Costello v. United States*, 365 U.S. 265 (1961), which excluded from the application of Rule 41(b) dismissals that are preliminary rather than on the merits. The Restatement of Judgments § 49, cmt. a (1942), which was cited by the Advisory Committee in its 1963 amendment of Rule 41(b), makes plain that Rule 41(b) was never intended to cover a statute-of-limitations dismissal.

Alternatively, if this Court were to hold that Rule 41(b) as a general matter addressed the preclusive effect of federal judgments, this Court should nonetheless hold that the phrase "upon the merits" must be determined under the law of the state in which the federal diversity court sits.

ARGUMENT

I. THE LAW OF THE FORUM STATE CONTROLS THE PRECLUSIVE EFFECT OF A FEDERAL DIVERSITY JUDGMENT.

The res judicata effect that must be given the judgments of state courts under the Full Faith and Credit Clause and the statute implementing and extending it, Art. IV, § 1, and 28 U.S.C. § 1738, has long been clear: the second forum must give the same res judicata effect as would the rendering state court.[5] *See Baker v. General Motors Corp.*, 522 U.S. 222, 233-35 (1998); *Parsons*

[5] The term "res judicata" is used here in a broad sense to refer to the entire subject of the effect of a prior judgment in a subsequent action.

Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 525-26 (1986). No similar constitutional or statutory provision expressly addresses the res judicata effect owed the judgments of federal courts, so that the rules in this area are ultimately set by this Court.[6]

More than a century ago, this Court articulated a simple rule to be followed with respect to the res judicata effect of the judgment of a federal court sitting in diversity: the judgment has the same effect as if it had been rendered by a state court in that forum. This rule has never been rejected or modified; indeed, in recent decades this Court's res judicata decisions have been crafted so as to avoid altering this basic rule.

Under this principle, the judgment below should be reversed.

A. *Dupasseur* Should Be Reaffirmed As a Matter of Stare Decisis.

In *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), this Court held that the res judicata effect of a federal diversity judgment "is such as would belong to judgments of the State courts rendered under similar circumstances," and that "no higher sanctity or effect can be claimed." *Id.* at 135. This Court opined that it was not enough that under general common law principles the defendant in the Louisiana state-court litigation under review would not be considered in privity with the defendant who had lost the earlier Louisiana federal court diversity case. Rather, the Court examined "with some care" the

[6] *See* Richard H. Fallon, Daniel J. Meltzer & David L. Shapiro, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1469, 1473-74 (4th ed. 1996); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 739-47, 753-55, 772-73 (1985); Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 315-27 (1993); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 984-89, 1005-08 (1998).

nature of Louisiana law concerning privity, *id.* at 135, and only after determining that there was nothing "peculiar in the Louisiana laws" which would support a finding of privity did the Court affirm the finding below that the earlier federal diversity judgment did not bind the defendant in the Louisiana state suit. *Id.* at 137.

In *Metcalf v. City of Watertown*, 153 U.S. 671, 676 (1894), this Court reaffirmed *Dupasseur*, stating that "[i]t cannot be doubted that . . . the judgment and decrees of" federal courts sitting in diversity "are entitled to the same sanctity and effect in the courts of each State, when those courts are held within the State, as their own judgments, nothing more, but nothing less."

In *Hancock National Bank v. Farnum*, 176 U.S. 640 (1900), this Court overturned the Rhode Island Supreme Court's attempt to apply its own res judicata law to shield one of its citizens from liability under a Kansas federal court judgment in a diversity case. In so doing, this Court reiterated again that the effect of the judgment is "not answered by referring to general principles of law . . . , but can be answered only by an examination of the decisions of the courts of Kansas." *Id.* at 643; *see also id.* at 644-45 ("what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered" and "[t]he fact that this judgment was rendered in a court of the United States, sitting within the State of Kansas, instead of one of the state courts, is immaterial").

The *Dupasseur* line of cases was left undisturbed in the following century, despite this Court's decisions in several cases in which it might easily have articulated a rule for the res judicata effect of federal court judgments that would displace *Dupasseur*.[7] Hence, *Dupasseur* has created a clear, predictable

[7] For example, in *Heiser v. Woodruff*, 327 U.S. 726, 731-33 (1946), involving the res judicata effect of a judgment in a federal question case, the Court carefully stated that it "need not consider whether . . . the rule of *res judicata* applied" in diversity cases "can be other than that of the state in which the federal court sits," and limited its analysis to reaffirming that "in non-diversity cases . . . the federal courts will apply their own rule of *res judicata*." *Id.* at 731-33 (citations omitted). In *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971), the Court reaffirmed its holding in *Heiser*, again making a narrow statement that as to res judicata, "[i]n federal-question cases, the law applied is federal law." *Id.* at 324 n.12. Lending support to the continued vitality of the *Dupasseur* line of cases, this Court noted that "[m]any federal courts, exercising both federal question and diversity jurisdiction, are in accord" in recognizing non-mutual collateral estoppel, "unless in a diversity case *bound to apply a conflicting state rule* requiring mutuality." *Id.* at 325 (emphasis added). *See also Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994) (narrow statement that "[s]tate courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions in issues of *federal* law") (emphasis added).

rule that proved practical and administrable for over a hundred years. Even in the days of "general federal common law" of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *Dupasseur* recognized the virtue of a simple rule under which the res judicata effect of a state-law adjudication is uniform – exactly the same effect as a state court in the first forum would give it – regardless of whether the adjudication takes place in a state or federal court.

Lockheed suggested in the courts below that *Dupasseur* was simply an artifact of the Conformity Act of 1872, Ch. 255, 17 Stat. 196 (repealed 1948). That is untrue. Not once in *Dupasseur* or its progeny did this Court even mention the Conformity Act. Because res judicata is a matter of substance, not procedure, there is no reason to think that revisions in federal procedure, such as the adoption of the Federal Rules of Civil Procedure in 1938, have had an impact on the res judicata effect of a diversity judgment.

Authoritative scholarship has established that *Dupasseur* rested on substantive concerns rather than on the Conformity Act. *See* Burbank, *supra* note 6, at 741-46, 748-52. The statutory framework which *Dupasseur* and its progeny construed was not the Conformity Act but the statutes establishing the jurisdiction of the federal courts and laws setting out the

obligations of full faith and credit. *See, e.g.*, *Embry v. Palmer*, 107 U.S. 3, 9-10 (1883); *Metcalf v. Watertown*, 153 U.S. 671, 676 (1894); *Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 644-45 (1900); *Knights of Pythias v. Meyer*, 265 U.S. 30, 33 (1924); *Stoll v. Gottlieb*, 305 U.S. 165, 167, 170 & n.6 (1938).

Thus, the rule of *Dupasseur* was built on a statutory jurisdictional framework that has remained unchanged. This Court should therefore adhere to the rule of *Dupasseur* as a matter of stare decisis. "Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Accordingly, this Court has said that it "will not depart from the doctrine of stare decisis without some compelling justification." *Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202 (1991).

Dupasseur involves precisely the sort of simple, black-letter rule where judicial consistency is important. Untold sessions of state legislatures have adopted statutes of limitations and other legislative measures against the background understanding that state law will govern their preclusive effect in federal litigation as well as in state court. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34-35 (1989) (Scalia, J., joined by Rehnquist, C.J., and O'Connor and Kennedy, JJ., concurring in part and dissenting in part) (noting special stare decisis concerns where legislatures operate against background understanding created by prior judicial decisions); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728-29 (1988) (declining to alter longstanding choice of law principles against which many state statutes of limitations had been adopted).

Moreover, because *Dupasseur* and its progeny interpreted congressional enactments which have not changed in relevant part, stare decisis has added weight in this case. This Court has recognized that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for [there], unlike in

the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."[8] Any change in the rule of *Dupasseur* should therefore be made by Congress, not by this Court.

B. The Rule of *Dupasseur* Is Correct.

Even if *Dupasseur* had never been decided, basic principles of federalism and diversity jurisdiction would require the same result. The simple rule of *Dupasseur* ensures that the res judicata effect of a state-law judgment is always the same, whether the judgment is rendered by a state or federal court. Deviating from this rule would introduce a host of complexities, undermine principles of federalism, trigger forum shopping, and lead to inequitable administration of state law. When the court rendering the first decision is state rather than federal, the Full Faith and Credit Act, 28 U.S.C. § 1738, requires use of the preclusion law that would apply in the rendering state's courts. For uniformity's sake the same preclusion law should govern whether the first action is in state or federal court.

This case provides a perfect illustration: If Semtek's first lawsuit had remained in California state court, there is no dispute that the Maryland courts would have decided the preclusive effect of the California judgment under state law rather than federal law, and that Semtek's suit would have been allowed to proceed in Maryland. Indeed, if the sequence of forums had been reversed – a California *state* court action followed by a Maryland *federal* court suit – it is common ground that, under Section 1738, the federal court would have been required to measure the preclusive effect of the California judgment under California

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[8] *Hohn v. United States*, 524 U.S. 236, 251 (1998) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-173 (1989)); *see also Ankenbrandt v. Richards*, 504 U.S. 689, 699-700 (1992) (adhering to statutory construction adopted in *Barber v. Barber*, 21 How. 582 (1859)); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting).

law.

1. Dupasseur *respects state policy choices concerning res judicata.* *Dupasseur* honors the ability of states to make deliberate choices regarding the scope of their respective laws of preclusion, without fear that their decisions will be overridden by federal courts. *See* Burbank, *supra* note 6, at 781-82, 794-97.

"For purposes of diversity jurisdiction a federal court is 'in effect, only another court of the State.'" *Angel v. Bullington*, 330 U.S. 183, 187 (1947) (citation omitted). "Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996). Thus, the Rules of Decision Act, originally § 34 of the Judiciary Act of 1789, provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

Within the body of state law that federal courts are required to apply is the law of res judicata. "State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes." *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 (1996). *See also Postal Tel. Cable Co. v. City of Newport, Ky.*, 247 U.S. 464, 475 (1918) ("[r]es judicata like other kinds of estoppel, ordinarily is a matter of state law"). Moreover, "the doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace . . . .'" *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917); *see also Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (same).

There are important variations among the states on issues of preclusion law. For example, a number of states (including Alabama, Florida, Georgia, Kansas, Mississippi, North Dakota,

and Virginia) still retain the traditional mutuality requirement.[9] Ohio provides a limited public policy exception but generally adheres to the mutuality requirement.[10] "The states that require mutuality are fully aware that they are in the minority; their decision to retain the requirement is deliberate." Erichson, *supra* note 6, at 967. However, without *Dupasseur*, these variations in state law will be overridden when federal courts sit in diversity, because federal law no longer requires mutuality. *Blonder Tongue Labs. v. University of Ill. Found.*, 402 U.S. 313 (1971).

The same obliteration of state law will occur with respect to whether alternative holdings are entitled to issue preclusion (many federal courts give issue-preclusive effect to each alternative ground, while numerous states do not);[11] whether a judgment on appeal has preclusive effect (yes in the federal courts, no in California, Georgia, Oklahoma, Tennessee, and Washington);[12] the definition of a "claim" (federal courts

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[9] *See, e.g., Jones v. Blanton*, 644 So.2d 882, 886 & n.2 (Ala. 1994); *Stogniew v. McQueen*, 656 So.2d 917, 919-20 (Fla. 1995); Ga. Code Ann. § 9-12-40 (1993); *McDermott v. Kansas Pub. Serv. Co.*, 712 P.2d 1199, 1208-09 (Kan. 1986); *Walker v. Kerr-McGee Chem. Corp.*, 793 F. Supp. 688, 695-96 (N.D. Miss. 1992); *Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380, 384 (N.D. 1992); *Angstadt v. Atlantic Mut. Ins. Co.*, 457 S.E.2d 86, 87-88 (Va. 1995). Louisiana did not recognize any issue preclusion at all until 1991 and apparently also requires mutuality. *See* La. Rev. Stat. Ann. § 13:4231.

[10] *See Cashelmara Villas, Ltd. Partnership v. DiBenedetto*, 623 N.E.2d 213, 215 (Ohio App. 1993).

[11] *Compare Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (CA7 1987), *with Baker Elec. Coop. v. Chaske*, 28 F.3d 1466, 1475-76 (CA8 1994) (applying North Dakota law); *Arab African Int'l Bank v. Epstein*, 958 F.2d 532, 535 (CA3 1992) (applying New Jersey law); *Marathon Oil Co. v. Babbitt*, 938 F. Supp. 575, 579 & n.9 (D. Alaska 1996); *Vanover v. Kansas City Life Ins. Co.*, 438 N.W.2d 524, 526 (N.D. 1989); Restatement (Second) of Judgments § 27, cmt. i (1982).

[12] *Compare Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497-98 (CADC 1983), *with* Cal. Civ. Proc. Code § 1049 (West 1990); Ga. Code Ann. § 9-12-

generally apply a broad transactional test, while many states do not);[13] and whether a dismissal for failure to state a claim is treated as a judgment on the merits (it is generally not in California, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Minnesota, New York, and Oregon).[14]

Consider the situation where the state in which the federal diversity court sits follows a substantively based preclusion rule that differs from the preclusion rules developed in federal question cases. For example, a state rule might refuse nonmutual preclusive effect to judgments in mass disaster cases for reasons of substantive policy. If the scope of the federal diversity judgment is not defined by reference to this rule, the defendant will suffer a disadvantage in the second action by being precluded by an independent federal rule of nonmutual preclusion, whereas if the scope of the judgment in the first

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19 (1993); *Grider v. USX Corp.*, 847 P.2d 779, 784 n.1 (Okla. 1993); *McBurney v. Aldrich*, 816 S.W.2d 30, 34 (Tenn.. App. 1991); *Chau v. City of Seattle*, 802 P.2d 822, 825 (Wash. App. 1990).

[13] *Compare Apparel Art Int'l, Inc. v. Amertex Enters. Ltd.*, 48 F.3d 576, 583 (CA1 1995), *with Benetton S.p.A. v. Benedot, Inc.*, 642 So.2d 394, 399-402 (Ala. 1994); *Olsen v. Breeze, Inc.*, 55 Cal. Rptr.2d 818, 826-27 (App. 1996); *Takahashi v. Board of Educ.*, 249 Cal. Rptr. 578, 584-85 (App. 1988), *cert. denied*, 490 U.S. 1011 (1989); *American States Ins. Co. v. Walker*, 477 S.E.2d 360, 364 (Ga. App. 1996); *Torcasso v. Standard Outdoor Sales, Inc.*, 626 N.E.2d 225, 228-30 (Ill. 1993); *Iowa Coal Mining Co. v. Monroe County*, 555 N.W.2d 418, 441-45 (Iowa 1996). *See generally* Howard P. Fink & Mark V. Tushnet, FEDERAL JURISDICTION: POLICY & PRACTICE 638 (2d ed. 1987) (discussing variations among the states in the definition of a "claim").

[14] *See Kanarek v. Bugliosi*, 166 Cal. Rptr. 526, 530 (App. 1980); *Gottlob v. Connecticut State Univ.*, No. CV 930521148S, 1996 WL 57087 (Conn. Super. Ct. Jan. 19, 1996); *Buie v. Waters*, 74 S.E.2d 883, 884-85 (Ga. 1953); *In re Estate of Cochrane*, 391 N.E.2d 35, 36 (Ill. App. 1979); *Smith v. Gray Concrete Pipe Co.*, 297 A.2d 721, 726 (Md. 1972); *Hacker v. Beck*, 91 N.E.2d 832, 834 (Mass. 1950); *H. Christiansen & Sons, Inc. v. City of Duluth*, 31 N.W.2d 277, 279-80 (Minn. 1948); *Amsterdam Sav. Bank v. Marine Midland Bank*, 528 N.Y.S.2d 184 (App. Div. 1988); *Briggs v. Bramley*, 177 F. Supp. 599, 600 (D. Or. 1959).

action is defined by state law, there would be no preclusion in the second action. Indeed, one could imagine that, in a jurisdiction where mutuality is required for collateral estoppel, a farseeing litigant could use Lockheed's rule deliberately to circumvent the state policy. By bringing a diversity case first, the litigant could obtain a judgment which then could be used for collateral estoppel purposes without the requirement of mutuality against the party the litigant wished to collaterally estop.

The risks to state law are not hypothetical. In *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1219-20 (Del. 1991), for example, the Supreme Court of Delaware refused to accord preclusive effect to a prior federal diversity judgment in Kansas because Kansas law does not recognize nonmutual issue preclusion: "precedent compels the application of state law when a federal court sitting in diversity is called upon to determine the preclusive effect to give a prior judgment. . . . [W]e view the preclusive effect to be given a prior judgment as an area of substantive law." Had the court applied Lockheed's approach, the outcome would have been different.

2. Dupasseur *avoids forum shopping and the inequitable administration of state law.* Without *Dupasseur*, a state-law judgment might mean one thing (for res judicata purposes) if rendered by a federal court and quite another if rendered by a state court. Accordingly, *Dupasseur* eliminates incentives for forum shopping and prevents the inequitable application of state law. *See* Burbank, *supra* note 6, at 767-68, 789-94.

In *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945), this Court held that a federal diversity court sitting in equity was required to apply a state statute of limitations: "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Id.* In *Guaranty Trust*, the plaintiffs were barred from seeking recovery in a state court because the action was untimely under the statute of limitations. This Court held

that a federal court in equity could not take cognizance of the suit simply because there was diversity of citizenship between the parties.

Similarly, in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), this Court opined that diversity jurisdiction should not make a difference in determining whether a state statute of limitations applied to bar an action: "There is simply no reason why, in the absence of a controlling federal rule, an action based on state law which concededly would be barred in the state courts by the state statute of limitations should proceed through litigation to judgment in federal court solely because of the fortuity that there is diversity of citizenship between the litigants." *Id.* at 753.

In this case, the question is analogous: whether a timely suit in Maryland that would not otherwise be precluded by a California judgment should be barred simply because there was diversity in the California action. *Guaranty Trust*, *Walker v. Armco Steel*, and other precedents demonstrate that the Maryland suit should not be barred. *See, e.g., Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 430-31 (1996) (*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), requires a federal district court, in ruling on new trial motion in diversity action, to apply New York statute regarding judicial review for excessive jury verdicts, rather than federal law standards: "Just as the *Erie* principle precludes a federal court from giving a state-created claim 'longer life . . . than [the claim] would have had in the state court,' so *Erie* precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court") (citation omitted); *Ferens v. John Deere Co.*, 494 U.S. 516, 523-28 (1990) (federal district transferee court must apply the state statute of limitations that the transferor court would apply, because under *Erie* a 28 U.S.C. § 1404(a) transfer should not change the state law applicable in a diversity case); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949) (when local law that creates the cause of action qualifies it, "federal court must follow suit," for "a different measure of the

cause of action in one court than in the other [would transgress] the principle of *Erie*").

While the principle of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), fortifies the rule of *Dupasseur*, the point is even more fundamental.[15] The goals of "discouragement of forum shopping and avoidance of inequitable administration of the laws" are rooted in the very nature of diversity jurisdiction. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). *Hanna* instructs federal courts to ask "whether application of the [State's] rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court." 380 U.S. at 468 n.9. The policy against different outcomes on the basis of citizenship is a "policy of federal jurisdiction." *Guaranty Trust Corp. v. York*, 326 U.S. 99, 101 (1945). *See also Walker v. Armco Steel Corp.*, 446 U.S. 740, 753 (1980) ("The policies underlying diversity jurisdiction do not support such a distinction . . . .").

The rule of *Dupasseur* is necessary both to avoid opportunities for forum shopping and to prevent inequitable administration of state law. These dangers are illustrated by this very case. Lockheed removed the California action from the Los Angeles Superior Court to the federal district court in Los Angeles and then sought to transform a non-merits limitations dismissal into a judgment claiming full res judicata effect by

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[15] This Court has recognized the relevance of *Erie*-like principles to the rule of *Dupasseur*. *See Heiser v. Woodruff*, 327 U.S. 726, 731-32 (1946) (asking "whether, apart from the requirements of the full faith and credit clause of the Constitution, the rule of res judicata applied in the federal courts, in diversity of citizenship cases, under the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64; cf. *Guaranty Trust Co. v. York*, 326 U.S. 99; *Holmberg v. Armbrecht*, 327 U.S. 392, can be other than that of the state in which the federal court sits").

misapplication of Rule 41(b). If the California action had not been removed to federal court (a removal which occurred only by the accident of diversity), the Maryland suit would have gone forward.

Dupasseur treats residents and non-residents equally by ensuring that the federal diversity judgment is governed by the preclusion law of the forum state, regardless of the citizenship of the parties. By contrast, under Lockheed's rule, a non-resident of the first forum state, who is able to remove the case to federal court and secure the application of federal preclusion law to the diversity judgment, is treated differently from a resident of the forum state. The out-of-state resident is permitted an option denied to the local resident. Yet this Court has cautioned that the "[a]vailability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens." *Angel v. Bullington*, 330 U.S. 183, 192 (1947); *see also Guaranty Trust*, 326 U.S. at 112 ("Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident. The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, is the law of the States.").

3. Dupasseur *respects the interests of the second forum state.* Lockheed's rule would invade the prerogative of the second forum (Maryland, in this case) to afford a plaintiff the opportunity to try her claims within the state's limitations period. Those interests are particularly strong where the earlier dismissal is based, as here, on limitations, which almost universally bars only the remedy and not the right. 18 Wright & Miller, *supra* § 4441 at 369; 18 MOORE'S FEDERAL PRACTICE ¶ 131.30[3][g][ii] (3d ed. 2000); Restatement (Second) of the

Conflict of Laws § 142(2) (1971). *See also Hauch v. Conner*, 453 A.2d 1207, 1214 (Md. 1983) ("With regard to the threshold matter of whether the court is open to a particular litigant, obviously the policy of the forum state is extremely important. . . . 'Access to forum courts is a matter for forum law to determine. . . . The forum's limitations rules represent its policy on the enforcement of stale claims, and a policy of repose may be relevant to all lawsuits filed in the forum's courts regardless of where the claims arose.'" (quoting Leflar, AMERICAN CONFLICTS LAW § 127, at 253 (3d ed. 1977)).

For example, Maryland has a particular interest in seeing that corporations incorporated in Maryland or having their principal place of business there, such as Lockheed, remain accountable in Maryland's courts if suit is filed within Maryland's limitations period. In fact, by its adoption of Maryland Rules of Court 2-101(b) and 3-101(b), Maryland has implemented "savings statutes" which afford a tolling of Maryland's statutes of limitations for any party who has filed an action elsewhere which has been dismissed under a shorter limitations period. These rules apply to a party who has filed suit in another state or U.S. district court – a suit that would be timely under the Maryland statute of limitations – and then finds itself dismissed under the non-Maryland tribunal's shorter limitations period. Such a party may timely refile the action in Maryland promptly after the entry of the foreign court's order, even though Maryland's statute of limitations would otherwise have expired.

Furthermore, there is no law providing that Maryland will "borrow" the shorter limitations period of another jurisdiction and use that period to bar an action untimely in the foreign jurisdiction. Maryland has a borrowing statute applicable only to products liability cases (Md. Code Ann. Courts and Judicial Proceedings § 5-115(b)), which shows that Maryland's legislature has considered the issue of differences in limitations periods in different jurisdictions and has affirmed Maryland's interest in permitting plaintiffs like Semtek to sue and in holding defendants like Lockheed accountable in Maryland courts if suit

is filed within Maryland's limitations period.

Lockheed's theory trumps Maryland's right to make that choice and closes the doors of the Maryland courts, contrary to that state's policy choice to afford a forum to plaintiffs like Semtek.

4. Dupasseur *respects the interests of the first forum state.* Lockheed's approach would also deprive the first forum of its interest in controlling the preclusive effect of a judgment concerning its law. For example, by California Code of Civil Procedure § 1908(a), the California legislature has dictated the effect of a judgment in an action applying California law in state court. To enable Lockheed to use the accident of diversity to accord greater preclusive effect to a dismissal pursuant to California's statute of limitations, than California would give a dismissal by one of its own courts, would in a sense entail hijacking California law. This effect flies in the face of the principle that "[t]he essence of diversity jurisdiction is that a federal court enforces State law and State policy. . . . [D]iversity jurisdiction must follow State law and policy." *Angel v. Bullington*, 330 U.S. 183, 191-92 (1947); *see also id.* at 192 ("A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.").

Under Lockheed's view, California would be compelled, should it wish not to adopt a statute of limitations with such a wide extraterritorial effect, to abandon the two-year statute of limitations altogether. Just as this Court has recognized that a federal court should not give a prior state court judgment greater preclusive effect than the state itself would give it, *see Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 384 (1985); *Union & Planters Bank of Memphis v. Memphis*, 189 U.S. 71, 75 (1903), so too California has an interest in avoiding having the effect of its statute of limitations stretched beyond anything it intended. Indeed, such commandeering of California law is analogous to the forbidden commandeering of state legislative, executive, and judicial branches that this Court

condemned in *New York v. United States*, 505 U.S. 144 (1992), *Printz v. United States*, 521 U.S. 898 (1997), and *Alden v. Maine*, 527 U.S. 706 (1999).

5. *There is no federal interest that would warrant departing from* Dupasseur. As this case illustrates, the federal interest in affording preclusive effect to a diversity judgment is attenuated at best. This is not a federal question case. This is a diversity case in which the plaintiff never wanted to be in federal court and in which the second forum is not a federal but a state court. The plaintiff's subsequent filing in a state court does not tax federal judicial resources. The resources in question are those of the second court – here the courts of Maryland – which has made a decision not to borrow California's statute of limitations and instead to be available to a subsequent suit. "[T]he federal interest in enforcing a diversity judgment is not as significant as the federal interest in enforcing a federal-question judgment." Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 313-14 (1993); *see also* Burbank, *supra* note 6, at 778-97; *Rivet v. Regions Bank of La.*, 522 U.S. 470 (1998) (federal interest in enforcing prior federal judgment does not create federal question jurisdiction).

There is no interest in "uniform" federal preclusion law that would justify abandoning *Dupasseur*. Variations in state law are the essence of federalism, not an "evil" to be corrected through the straitjacket of a single federal rule. As this Court explained in holding that federal courts must apply state choice of law rules:

> Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. . . . Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not

for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.

Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

Moreover, repudiating *Dupasseur* hardly ensures the development of a *uniform* federal approach. As one court opined in an analogous context in refusing to displace state law with federal common law, "there is no guarantee that the assumption of federal jurisdiction would result in a single position of the United States. There are hundreds of federal judges who could preside over similar cases and reach different conclusions, and there is no guarantee that a circuit split would be resolved by the Supreme Court." *In re Tobacco/Governmental Health Care Costs Litig.*, 100 F. Supp. 2d 31, 38 (D.D.C. 2000). Indeed, the federal courts of appeals are split over basic principles of preclusion law, such as offensive nonmutual issue preclusion. *See, e.g.*, 18 MOORE'S FEDERAL PRACTICE ¶ 132.04 (3d ed. 2000) (cataloguing cases). This Court rarely has the opportunity to grant review of, and resolve, these rather recondite preclusion issues. By contrast, the high courts in the several states are able to address conflicts in a more timely fashion. Therefore, following the preclusion law of the state in which the federal diversity court sat is a more efficient, administrable, and reliable system than relying on the development of a uniform federal preclusion law.

Critics of *Dupasseur* sometimes contend that the fact that federal law requires recognition of federal judgments mandates that federal rules of preclusion be used. That is a non sequitur. For example, federal law also determines what substantive law a diversity court applies, but mandates the use of state substantive law (28 U.S.C. § 1652), including state statutes of limitations, *Guaranty Trust Corp. v. York*, 326 U.S. 99 (1945), and state choice of law rules. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

Critics of *Dupasseur* also argue that it should be the

prerogative of the federal courts to determine the scope and effect of their own judgments. But in a diversity case, those judgments involve application of state law. A federal court is not "demeaned" by having the preclusive effect of its judgment determined by state law, when state law provides the rule of decision for the diversity judgment in the first place. In any event, the court which issues a judgment rarely has the opportunity to rule on its res judicata effect. *See, e.g.*, Advisory Committee Notes on Fed. R. Civ. P. 23, 1966 Amendments (referring to the "recognized principle that the court conducting the action cannot predetermine the res judicata effect of the judgment; this can be tested only in a subsequent action").

In statute-of-limitations dismissals, there is ordinarily no significant federal interest in protecting litigants from having to relitigate the merits. Here, for example, the judgment in California was on a motion to dismiss, no discovery was conducted, and Lockheed was not put to the burden of presenting a defense. Allowing the Maryland action to proceed would not threaten a federal interest or any federal substantive right and would not interfere with federal procedure, because the case was not in federal court. Further, the California federal court never considered whether Semtek's lawsuit was timely under *Maryland* law. Hence, the basic aim of res judicata – to provide finality for matters that the parties "have had a full and fair opportunity to litigate," *Montana v. United States*, 440 U.S. 147, 153-54 (1979) – is not implicated here.

Therefore, under *Dupasseur*, Semtek should have been permitted to bring its claims in Maryland courts. The point is not that the California federal district court *erred* in dismissing and stating that its judgment was "on the merits" and "with prejudice." Semtek does not seek any *change* in the California federal judgment; the question is what that judgment *means*. Under California law, the phrases "on the merits" and "with prejudice" simply mean issue preclusion in the context of a statute-of-limitations dismissal. *See Gagnon Co. v. Nevada Desert Inn*, 289 P.2d 466, 472 (Cal. 1955) ("a mere statement

that a judgment of dismissal is 'with prejudice' is not conclusive. It is the nature of the action and the character of the judgment that determines whether it is res judicata."); *Goddard v. Security Title Ins. & Guar. Co.*, 92 P.2d 804, 807-08 (Cal. 1939) (disregarding "with prejudice" language in prior federal diversity judgment and affording that judgment no res judicata effect: "if the judgment is clearly not on the merits, the court's intention to make it a bar is immaterial. The words 'with prejudice' add nothing to the effect of a judgment in such a case, no matter what light they throw on the intention of the court"); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (CA9), *cert. denied*, 525 U.S. 963 (1998) ("California has emphasized the fact that the statute of limitations is a kind of procedural bar, and not one that relates to the merits of the case. In fact, California has pointed out that a judgment based on the statute of limitations regarding a cause of action in one suit is not necessarily res judicata in a second suit, which pleads a different cause of action based on the same core of underlying facts.").

II. EVEN IF *DUPASSEUR* DID NOT CONTROL, FEDERAL LAW SHOULD PROVIDE THAT A STATUTE-OF-LIMITATIONS DISMISSAL BY A FEDERAL COURT GENERALLY DOES NOT BAR A SUBSEQUENT ACTION IN A DIFFERENT STATE.

If this Court concludes, contrary to *Dupasseur*, that federal law rather than state law governs the res judicata effect of a limitations dismissal in diversity, the judgment below should nonetheless be reversed.

A. Federal Law Would Borrow the Rule of the Forum State.

Even if the res judicata effect of a diversity judgment is governed by federal law, there is no important federal interest dictating the use of a nationally uniform rule governing the effect

of a statute-of-limitations dismissal. As this Court has done on other issues involving federal litigation of state-law claims where no statute or rule is explicitly controlling, this Court should hold that the federal common law rule here is one that *borrows* the pertinent state-law res judicata rule that would have applied if the case had been brought in, or had remained in, state court. Such an approach would reflect the philosophy that "although federal law must ultimately control the choice, federal law should at times apply state preclusion rules to federal judgments on state questions. This is the position adopted by the Restatement Second of Judgments." 18 Wright & Miller, *supra*, § 4472, at 734 (citing 1 Restatement (Second) of Judgments § 87 (1982)). *See also* Restatement (Second) of Conflict of Laws § 95 cmt. h (1988 rev.) ("When a federal judgment adjudicates claims under State law, State law, as a matter of federal law, may determine the effects of the judgment.").[16]

Borrowing state preclusion law in this context would retain much of the practical value of the *Dupasseur* rule in preventing the accident of a federal diversity forum from leading to a markedly different result from the one that would have obtained in state court. In so doing, this approach would help promote the strong federal interest in preventing the inequitable administration of the laws and in minimizing opportunities for outcome-determinative forum-shopping.[17]

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[16] It thus is no answer for Lockheed to assert that the res judicata effect of the California judgment is a matter of "federal law." "[K]nowing whether 'federal law governs' . . . does not much advance the ball. The issue in the present case is whether the California rule of decision is to be applied . . . and if it is applied it is of only theoretical interest whether the basis for that application is California's own sovereign power or federal adoption of California's disposition." *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 85 (1994) (holding that California law governs whether knowledge of corporate officers is imputed to corporation in California state law claim brought by FDIC).

[17] *See Semler v. Psychiatric Inst. of Washington, D.C., Inc.*, 575 F.2d 922, 927-928 & n.33 (CADC 1978) (Wilkey, J.) ("[T]he principles of *Erie* . . . and

This Court has often directed the borrowing of state-law rules in diversity cases. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *see also Ferens*, 494 U.S. at 532 (declining to fashion a federal common law of choice-of-law rules, because "state conflicts-of-law rules already ensure that appropriate laws will apply to diversity cases"). Of particular relevance here, in defining the applicable statute of limitations even for federal law claims where Congress has not addressed the matter, this Court has generally directed the use of the statute-of-limitations law of the forum state where compatible with federal interests, despite the substantial variations among fora caused by such borrowing.[18] If borrowing is appropriate in *federal question* cases, *a fortiori* it is warranted in the *diversity* context.

There is no evident basis for developing a uniform federal common law rule to determine the res judicata effect of a statute-of-limitations dismissal in a diversity case. A "significant conflict" between a federal policy or interest and state law is "normally a 'precondition'" before federal courts may "fashion

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the mandate of the Full Faith and Credit Clause as supplemented by 28 U.S.C. § 1738 require a federal court exercising diversity jurisdiction in forum II to give to the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, at least in the absence of an overriding federal interest."); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1185 (CA4 1989) (Murnaghan, J., dissenting) (citing Restatement (Second) of Judgments § 20 cmt. n)); *cf. Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (holding that federal courts should not allow use of offensive, nonmutual collateral estoppel where "application of offensive estoppel would be unfair to a defendant").

[18] *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 146-48 (1987); *id.* at 157-65 (Scalia, J., concurring in the judgment); *Wilson v. Garcia*, 471 U.S. 261, 266-71 (1985); *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 158-62 (1983); *International Union* v. *Hossier Cardinal Corp.*, 383 U.S. 696, 703-04 (1966); *Campbell* v. *Haverhill*, 155 U.S. 610, 614-15 (1895).

rules of common law," *Atherton* v. *FDIC*, 519 U.S. 213, 218 (1997) (citing *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994); *Wallis* v. *Pan Am. Petro. Corp.*, 384 U.S. 63, 68 (1966)), and "cases in which judicial creation of a special federal rule would be justified" are "'few and restricted.'" *O'Melveny & Myers*, 512 U.S. at 87 (quoting *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963)). In the great majority of cases in which no federal policy mandates the creation of uniform, judge-made federal common law, the Court will "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979).

Application of California law in this case would present no conflict, much less a "significant conflict," with a federal policy or interest. The cases in which the Court has found such a conflict all have involved federal causes of action or cases in which federal entities were parties, and even in those circumstances the Court generally borrows state law.[19] This case involves only private parties and no interference at all with the uniform application of any federal cause of action. The need for a uniform federal rule is further diminished by the state-law nature of the claims at issue. Indeed, it is particularly important in a system of federalism to take account of variations among the

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[19] *Compare United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) (federal law supplants "aberrant" and "hostile" state law intended to disadvantage federal policy regarding migratory birds) *with, e.g., Atherton v. FDIC*, 519 U.S. 213 (1997) (notwithstanding numerous federal policies identified by FDIC, application of state standards to conduct of officers and directors of federally insured depository institution does not create sufficient conflict with federal law to justify creation of general federal common law); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994) (state law imputing knowledge to FDIC officials does not conflict with federal banking policy sufficiently to justify creation of federal common law); *United States v. Kimbell Foods*, 440 U.S. 715 (1979) (asserted conflict between federal policy and state law governing priority of federal liens not sufficient to justify general federal common law).

states and to be solicitous of the collateral effects that a dismissal might have upon a cause of action created by a sovereign state such as Maryland.[20]

Lockheed's contention that a federal policy in favor of res judicata can be gleaned implicitly from federal law, including from the federal rules of civil procedure, is incorrect. *See* Part III, *infra*. It is also erroneous in any event because any such "implicit" policy is insufficient to justify creating federal common law in favor of borrowing state law. Congress and the drafters of the rules of civil procedure act "against the background of the total corpus juris of the states," recognizing that interstices in federal law will be filled by reference to state law. *Atherton*, 519 U.S. at 218. Accordingly, the failure of Congress and the drafters of the federal rules of civil procedure to announce a clear federal rule of preclusion is strong evidence that resort to state law is appropriate.

Finally, adoption of a uniform federal rule would be inappropriate because it would significantly undermine state interests. *E.g.*, *Board of County Commr's* v. *United States*, 308 U.S. 343, 351 (1939) (when federal policy leaves it to courts to determine rule of decision, "[n]othing seems to us more appropriate than [taking] due regard for local institutions and local interests"). In a closely analogous series of decisions –

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[20] *See, e.g., O'Melveny & Myers*, 512 U.S. at 88 ("Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty – but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules." (citing *United States* v. *Yazell*, 382 U.S. 341, 347 n.13 (1966))); *International Union* v. *Hossier Cardinal Corp.*, 383 U.S. 696, 702 (1966) ("For the most part, statutes of limitations come into play only when these processes have already broken down. Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of [federal] labor policy."); *see also United States* v. *Kimbell Foods*, 440 U.S. 715, 730 (1979) (explaining that the Court's precedents "reject generalized pleas for uniformity as substitutes for concrete evidence" in determining whether a uniform federal common law standard must be adopted).

establishing a "settled practice" of borrowing a state statute of limitations period so long as it does not conflict with federal policy – this Court has emphasized that "federal law incorporates the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson* v. *Garcia*, 471 U.S. 261, 267, 271 (1985). Lockheed would abrogate precisely that state interest in this case. *See also Bauserman* v. *Blunt*, 147 U.S. 647, 652-53 (1893) ("No laws of the several States have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a State, and as construed by its highest court.").[21]

B. If This Court Sets a Uniform Rule, It Should Adopt the Overwhelming Majority Rule that a Statute-of-Limitations Dismissal Does Not Preclude Suit in Another Forum.

If this Court does not borrow state law, a second available option would be simply to adopt, as a uniform federal common-law rule governing the res judicata effect of a statute-of-limitations dismissal, the traditional rule that such a dismissal does not preclude suit in another forum with a longer limitations period (at least so long as the rule of the rendering jurisdiction bars only a remedy in that jurisdiction's courts, and not the right itself). This is the rule adopted in the Restatement (Second) of

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[21] The state interests raised by the statute of limitations cases also were considerably less substantial than here because the "borrowed" limitations were merely "analogous" to the federal claim in question. In this case, by contrast, the provision of state law to be borrowed – California's rule that a limitations dismissal does not bar an action in a different jurisdiction where suit is timely – without question is directly on point and was adopted to govern precisely a case such as this one.

the Conflict of Laws § 142(2) & cmt. g, § 143, and it is by far the majority rule. The leading federal court opinion articulating this traditional rule is Justice Story's opinion in *United States v. Donnally*, 33 U.S. (8 Pet.) 361, 370 (1834). This rule has produced "the general conclusion that dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations." 18 Wright & Miller, *supra*, § 4441, at 369. *See also Townsend v. Jemison*, 50 U.S. (9 Cranch) 407, 413 (1850) ("The rule in the courts of the United States, in respect to pleas of the statutes of limitation has always been, that they strictly affect the remedy, and not the merits."); *Union Nat'l Bank v. Lamb*, 337 U.S. 38, 46 (1949) (Frankfurter, J., dissenting) ("[W]here the enforcement of a judgment by State A is sought in State B, which has a longer limitation period than State A, State B is plainly free to enter its own judgment upon the basis of State A's original judgment, even though that judgment would no longer be enforceable in State A."); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722-23, 726 (1988) (noting long history of the view that the bar of the statute of limitations does not prevent subsequent suit in another jurisdiction).

III. RULE 41(B) DOES NOT REQUIRE A CONTRARY RESULT.

A. Rule 41(b) Should Not be Read as Deciding the Issue of the Preclusive Effect to Which Federal Diversity Judgments Are Entitled.

The court below rested its decision on Fed. R. Civ. P. 41(b). But the issue of the res judicata effect of a federal diversity judgment is not a question bound up in the particular procedures that a federal court uses in deciding cases. It is instead a matter lying outside the bounds of procedure. The question cannot be answered by simple reference to Fed. R. Civ. P. 41(b).

The meaning and applicability of Rule 41(b) in this context

has been analyzed by esteemed commentators, including Wright, Miller, and Cooper, who, after an in-depth analysis of the very problem presented here, conclude:

> As complex as these questions of limitations and preclusion are, one clear proposition can be advanced. Answers cannot be found in the provision of Civil Rule 41(b) . . . . Although some decisions have suggested that Rule 41(b) does provide an answer, the questions are too important to be resolved in this offhand manner. Here as elsewhere, Rule 41(b) need mean only that the dismissal precludes relitigation of the same limitations issues in the same court. Any greater effect should depend on independent analysis.

18 Wright & Miller, *supra*, § 4441, at 372-73. Numerous other scholars share the same view. *See* Burbank, note 6, *supra* at 782-83 ("[T]he Rules Enabling Act does not authorize Federal Rules of preclusion, and the rulemakers, with few exceptions, have not sought to state them. . . . [P]roperly viewed, Rule 41(b) merely states what other sources of federal law, of a nationally binding character, have the power to determine; it thus provides fair notice to litigants. Federal law standards are necessary to determine when a federal judgment can preclude subsequent litigation, whatever law governs the preclusive effects of that judgment.").[22]

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[22] Lilly, *supra* note 6 at 320-21 & n.113 (Federal Rules of Civil Procedure "probably" do not "operate directly to dictate their res judicata consequences in other courts" and "under one view, could not, without running afoul of the Enabling Act"); Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 COLUM. L. REV. 1505, 1524 (1985) ("The initial diversity judgment is entitled to the same preclusive effect that would be given to a judgment of a state court in its jurisdiction."); Allan R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1937 n.11 (1991) ("a federal dismissal on the merits of claims cognizable in state court would appear inconsistent with the basic obligation to apply state substantive law").

The text of Rule 41(b) is terse and refers merely to "an adjudication upon the merits." The significance of a dismissal is determined not by the use of those few words but rather by the considerations of federalism and full faith and credit that are at stake. Indeed, the phrase "upon the merits" is now considered unhelpful and is not used in the Second Restatement of Judgments "because of its possibly misleading connotations." Restatement (Second) of Judgments § 19, cmt. a (1982). *See also* Stephen C. Yeazell, CIVIL PROCEDURE 828 (5th ed. 2000) ("This phrase conceals more than it explains, because it entirely begs the real question: For what reasons should we attach preclusive effect to a judgment?").

A further indication that Rule 41(b) does not answer the preclusion question raised here is the presence of the verb "operates" in the text of the Rule. The question presented here is: *where* does a dismissal subject to Rule 41(b) "operate" as "an adjudication upon the merits"? The answer cannot be found in Rule 41(b). Indeed, it would be odd to construe Rule 41(b) as supplying that answer for the *state* courts – in the sense of deciding the preclusive effect that a state court is required to give to a federal diversity judgment – because, by their very terms, the Federal Rules apply only to the *federal* courts. Rule 1 of the Federal Rules states: "These rules govern the procedure *in* the United States district courts . . . ." *See also* FRCP 82 ("These rules shall not be construed to extend or limit the jurisdiction of the federal courts."). The Rules Enabling Act, 28 U.S.C. § 2072, confers the power to make federal rules of practice "for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals," which rules "shall not abridge, enlarge or modify any substantive right." No federal decision has ever required a *state* court to apply the Federal Rules of Civil Procedure. *E.g., Rader v. Baltimore & O.R. Co.*, 108 F.2d 980, 986 (CA7), *cert. denied*, 309 U.S. 682 (1940) ("It is obvious that the rules can only have application to proceedings in the Courts of the United States, and can not be applied to the practice or procedure in State Courts, nor affect the rights of

parties in such Courts."); *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1279 (CA9 1980) ("Rule 41(b) cannot be invoked to assist the state judiciary in managing its business.").[23]

A dismissal "upon the merits" (or as the California federal court put it, "with prejudice"), in other words, is entitled to whatever preclusive effect it has under the law governing that effect. The question of the claim preclusive effect of a statute-of-limitations dismissal in an action in *another* jurisdiction is determined not by Rule 41(b) but rather by what Wright & Miller and the other noted commentators describe as a necessarily complex and sophisticated analysis. The question is not *issue* vs. *claim* preclusion, but rather the proper *scope* of claim preclusion – in particular, its impact on a subsequent action in another forum. Thus, the situation here is very much like a case raising a question of the applicability of the mutuality rule when a dismissal has occurred "on the merits." Lockheed concedes that in that instance the question of mutuality vel non is not answered by Rule 41(b). *See* BIO 14.

Rule 41(b) should not, and need not, be read to decide this important and difficult issue of federalism and full faith and credit. This Court has suggested that the Federal Rules of Civil

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[23] Although Rule 41(b) has been applied in situations where there have been successive *federal court* filings, here, of course, the second suit was filed in Maryland *state* court. *Reinke v. Boden*, 45 F.3d 166, 171 (CA7), *cert. denied*, 516 U.S. 817 (1995) ("Whatever might be the merit of this approach [to Rule 41(b)] in cases that involve successive suits in the federal courts — and there has been serious criticism — the rationale of these decisions cannot control our case. Unlike any of these cases, we do not have before us two successive federal suits. This difference is not a formalistic one. An intrasystem use of res judicata for dismissals on the ground of the expiration of a statute of limitations promotes judicial economy within that system. . . . In the context of the intersystem use of res judicata, however, the intent of the first forum to save the resources of the second cannot be so readily presumed. The first forum does not share the same interest in restricting the scope of its judgment because any subsequent suit will take place in the forum of another system.").

Procedure do not cover preclusion. *See Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994) ("The federal rules on the subject of issue and claim preclusion . . . are 'almost entirely judge made.'" (quoting P. Bator, et al., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1598 (3d ed. 1988)). Although in *Hanna* this Court held that the outcome-determinative test of *Guaranty Trust* was not to be used to judge the validity of a Federal Rule, *Hanna* also opined that "in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, [a court] need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts . . . ." 380 U.S. at 473. The application of federal preclusion law may well make a dramatic difference to the course of the litigation, as this case illustrates, for variations between preclusion rules are "rarely nonsubstantial or trivial." Stuart D. Smith, Note, Erie *and the Preclusive Effect of Federal Diversity Judgments*, 85 COLUM. L. REV. 1505, 1513 (1985).

Similarly, in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536 (1958), this Court indicated that a federal court should apply a state rule if it is "bound up with the definition of the rights and obligations of the parties." Here, preclusion law is intertwined with the parties' rights and obligations under the California statute of limitations. California has deliberately provided that a statute-of-limitations dismissal does not preclude suit in another state with a longer limitations period.

Hence, this Court should follow the established practice of "interpret[ing] the Federal Rules . . . with sensitivity to important state interests and regulatory policies" and "to avoid conflict with important state regulatory policies." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 n. 7, 438 n.22 (1996). In *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-52 (1980), for example, this Court reaffirmed the decision in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), that state law rather than Rule 3 determines when a diversity action commences for the purposes of tolling the state statute of

limitations. In *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943), this Court held that Federal Rule 8(c) does not make contributory negligence an affirmative defense, but relates only to the manner of pleading. "The question of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply." *Id.* at 117.

Moreover, stretching Rule 41(b) to cover the preclusion issue presented by this case would not bring the simplicity and uniformity that Lockheed claims. "[T]he use and application of the phrase 'on the merits' has been imprecise at best." *Baris v. Sulpicio Lines*, 74 F.3d 567, 570 (CA5 1996), *judgment affirmed by an equally divided court*, 101 F.3d 367 (CA5 1996), *cert. denied*, 520 U.S. 1181 (1997). Even one of Lockheed's own counsel has acknowledged that the words "on the merits" "cannot be taken literally." Martin H. Redish, et al., CIVIL PROCEDURE: A MODERN APPROACH 1140-41 (3d ed. 2000). Thus, courts interpreting Rule 41(b) dismissals are frequently required to engage in substantial inquiry to determine the preclusive effect of the judgment.[24]

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[24] *E.g., In re Casse*, 198 F.3d 327, 333 (CA2 1999) ("The Order does not say with prejudice to what, although it could have done so, viz, 'with prejudice to any further filings under the Bankruptcy Code,' or 'with prejudice to any further filings under Chapter 11.' Accordingly 'with prejudice' may be regarded as ambiguous, as at least one other circuit has found when the phrase is used in a bankruptcy court's order." (citing *Colonial Auto Ctr. v. Tomlin*, 105 F.3d 933, 940 (CA4 1997)); *Kulinski v. Medtronic Bio-Medicus, Inc.*, 108 F.3d 904, 909 (CA8 1997) (dismissal for lack of jurisdiction "with prejudice" does not operate as an adjudication on the merits because, despite the label, the ruling did not reach the merits); *Reinke v. Boden*, 45 F.3d 166, 170-71 (CA7), *cert. denied*, 516 U.S. 817 (1995) (Minnesota rule stating that judgment was "on the merits" is not claim preclusive where the dismissal was on limitations grounds); *Brye v. Brakebush*, 32 F.3d 1179, 1185 & n.7 (CA7 1994) ("where doubt exists regarding the finality of a prior order of dismissal, the court may look beyond the words 'with prejudice' to determine if the dismissal was meant to be conclusive. . . . [T]o properly determine the preclusive effect of a prior judgment, the court not only may, but 'must inspect a judgment pleaded in bar, and if necessary explore the record, to ascertain

Indeed, far from achieving uniformity, Lockheed's proposed approach would only breed uncertainty, contrary to the principles of sound judicial administration and consistency that underlie the rules of civil procedure and the doctrine of res judicata. Lockheed wrongly assumes that Rule 41(b) establishes a blanket rule of preclusion, such that it renders all limitations dismissals in diversity res judicata. In reality, as the text of Rule 41(b) makes clear and as this Court held in *Costello v. United States*, 365 U.S. 265 (1961), dismissals under the Rule "operate as adjudications on the merits *unless the court specifies otherwise*." 365 U.S. at 285 (emphasis added). The rule thus is nothing more than a default provision addressing "non-specifying orders . . . of uncertain meaning." *Weissenger v. United States*, 423 F.2d 795, 799 (CA5 1970) (en banc) (citing *Costello*).[25] Accordingly, were this Court to adopt Lockheed's view that Rule 41(b) governs the preclusive effect of federal judgments of dismissal, it would leave district courts entirely free to deprive any dismissal order of res judicata effect simply by noting that the dismissal is "without prejudice." Indeed, for district courts located in jurisdictions that follow the common law, there is every reason to believe that federal district judges would follow the state rule in diversity cases and provide that such dismissals are without

what was determined by it.'"); *D'Angelo v. City of New York*, 929 F. Supp. 129, 135 (S.D.N.Y. 1996) ("Even where a dismissal is specifically 'on the merits' or 'with prejudice,' the circumstances must warrant barring the litigant from further pursuit of his claim in order for these phrases to be given preclusive effect.").

[25] That Rule 41(b) is merely a default rule is reinforced by Rule 41(a), which sets forth a similar default standard with an exception that expressly is withdrawn from the district judge's discretion. *See* FRCP 41(a)(1) ("*Unless otherwise stated in the notice of dismissal or stipulation*, the dismissal is without prejudice, *except* that a notice of dismissal operates an adjudication upon the merits when filed by a plaintiff who has once dismissed . . . an action based on or including the same claim." (emphases added)); *see also* FRCP 41(a)(2) ("*Unless otherwise specified in the order*, a dismissal under this paragraph is without prejudice." (emphasis added)).

prejudice.[26] *Cf.* Justice Stone to Professor Frankfurter, *quoted in* C. Miller, THE SUPREME COURT AND THE USES OF HISTORY 13 (1969) ("I can hardly see the use of writing judicial opinions unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are not better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration for the writer of the opinion and would much better be left unsaid.").

The detrimental consequences that would follow from Lockheed's reading of Rule 41(b) are substantial. That rule applies to virtually all dismissals. Lockheed thus would grant district judges uncabined discretion to determine the res judicata effect of their own judgments not only for limitations dismissals in diversity cases but for *all* dismissals entered on *any* jurisdictional basis, whether diversity, federal question, or supplemental jurisdiction. As Lockheed acknowledges: "Under Rule 41(b), it is the rendering court that has the authority to determine the preclusive effect of its own statute of limitations dismissal (*as well as all other dismissals not specifically excepted from the scope of the rule*)." BIO 18-19 (emphasis

[26] In this very case, the California federal district court apparently intended that the dismissal merely prevent repleading and refiling of a complaint in California and not preclude the subsequent Maryland action. Although the court stated that its views were dicta and should not be cited to the Maryland courts (App. 71a n.17), the California district court explained in refusing to enjoin the Maryland action that its prior decision had rested on the California statute of limitations and "did not reach the substantive merits of Plaintiff's tort claims." App. 71a. The court opined that it would not bar "another proper forum" from "afford[ing] plaintiff another opportunity to fully litigate the merits of its causes of action" if that forum would not apply "a statutory or res judicata bar." *Id.* In fact, the district court opined that "it is not obvious to this Court that res judicata applies to bar Plaintiff's action in Maryland state court." *Id.* at 71a n.17. Thus, the facts in this case give rise to an inference that the court's orders meet Rule 41(b)'s "unless the court otherwise specifies" exception.

omitted and added).[27] The only dismissals that would be exempted are those expressly denominated "on the merits" in the rules of civil procedure themselves or that are expressly exempted in Rule 41(b) itself (i.e., "a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19").

It simply makes no sense to award district judges such discretion through the back door of Rule 41(b), as is plain from the fact that Lockheed's position would, ironically, *limit* the application of res judicata in those circumstances where this Court (as a matter of federal law governing federal claims) and states (as a matter of state law governing state claims) have determined that res judicata should apply. To take the simplest example, some states (although not California) agree with Lockheed that a statute-of-limitations dismissal should be res judicata in an action in another forum. But on Lockheed's view, a federal district court's dismissal under that state's law *might or might not* be res judicata, depending on whether the district court

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[27] Lockheed's position in this regard could not be clearer. *See* BIO 4-5 (if the district court had "specif[ied] that the limitations dismissal was *not* on the merits [that] would mean that under the terms of Rule 41(b), it would not be treated as a merits adjudication with res judicata effect" (emphasis in original)); *id.* 11 ("Under *Hanna*, Rule 41(b) and not state law properly applied when the district court ruled that its limitations dismissal was 'with prejudice' and 'on the merits,' instead of specifying that its order should have no res judicata effect."); *id.* 16 (under Rule 41(b) "any other dismissal is 'on the merits' unless otherwise expressly provided" and in this case the district court did not "specify something less than claim preclusive effect"). Courts following Lockheed's view agree. *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 (CA2), *cert. denied*, 464 U.S. 936 (1983) ("It is clear that if, at the time of entry, the Washington judgment had been denominated 'without prejudice,' Rule 41(b) would have been inapplicable, and Harris could legitimately have reasserted its allegations in another jurisdiction."); *Weissenger v. United States*, 423 F.2d 795, 799 (CA5 1970) (en banc) (quoted in the text); *Sack v. Low*, 478 F.2d 360, 364 (CA2 1973) (Friendly, C.J.) (under Rule 41(b) "the District Judge may specify that his order be without prejudice").

elects to denominate the dismissal as "without prejudice." Because Rule 41(b) governs virtually all dismissals, Lockheed would also grant district judges the same discretion with respect to a federal court's dismissal of a federal antitrust suit not only on limitations grounds but on any number of other bases. The preclusive effect of such a judgment would reside within the discretion of the trial judge, a holding that conflicts directly with this Court's determination that merits dismissals on federal claims are res judicata without regard to discretionary considerations. *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 398 (1981) ("There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." (citing *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1877))).

There simply is no basis for displacing the clear and settled rules of res judicata and preclusion adopted by California and Maryland (and the forty-eight other states) in favor of such a policy (if it can be called that) of substantial indeterminacy, thereby depriving litigants of any way of knowing ex ante the res judicata effect that will attend the dismissal of almost any action. To the contrary, such a ruling would conflict with this Court's repeated holding that res judicata, when applicable, is virtually a per se rule, not amenable to loose discretionary determinations by the judiciary. "'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." *Moitie*, 452 U.S. at 401; *see also United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950) (distinguishing the "uniform rule" of res judicata from the "discretionary rule of practice" of the law of the case doctrine); *Wong Doo v. United States*, 265 U.S. 239, 241 (1924) (describing res judicata as an "inflexible doctrine");

Southern Ry. Co. v. Clift, 260 U.S. 316, 319 (1922) (distinguishing law of the case, which "directs discretion," from res judicata, which "compels judgment").

By itself, this difference in character between Rule 41(b) and the nature of res judicata reinforces the conclusion that Rule 41(b) was not intended to create a federal law of preclusion. It is no answer to say that district judges would not necessarily have unfettered discretion in determining whether to give their dismissals res judicata effect but instead could be guided by principles of federal law. At the very least, numerous disputes would arise on appeal regarding whether the district court should have exercised its discretion under Rule 41(b) to deviate from the applicable federal standard. But, even more importantly, if Lockheed's position requires looking beyond the text of Rule 41(b) to a background principle of federal law, Lockheed cannot prevail. As we explain at length in Part I, *supra*, that principle is supplied by *Dupasseur* and its progeny, which hold that the res judicata effect of a judgment is determined by the law of the forum state. Lockheed cannot plausibly maintain that *Dupasseur* has been supplanted by Rule 41(b) while simultaneously arguing that Rule 41(b) requires reference to precisely the background principles that *Dupasseur* has long provided.

Alternatively, if this Court were to hold that Rule 41(b) as a general matter addressed the preclusive effect of federal judgments, this Court should nonetheless hold that the phrase "upon the merits" must be determined under the law of the state in which the federal diversity court sits. In this case, California law provides that a statute-of-limitations dismissal does not preclude a subsequent action in a different forum and therefore is not "upon the merits."

B. Rule 41(b) Does Not Accord Preclusive Effect to a Statute-of-Limitations Dismissal.

Even if, as a general matter, Rule 41(b) governed the preclusive effect of a dismissal order, Rule 41(b) does not accord

preclusive effect to the *type* of dismissal entered here: a dismissal under a statute of limitations. Controlling here is *Costello v. United States*, 365 U.S. 265 (1961), which excluded from the application of Rule 41(b) dismissals that are preliminary rather than on the merits.

Costello involved two denaturalization complaints filed by the government alleging that the petitioner had filed a fraudulent petition for naturalization. This Court invalidated the government's first complaint because it was not accompanied by a statutorily required affidavit of good cause. 356 U.S. 256 (1958). On remand, the government argued that the complaint should be dismissed "without prejudice," but the district court ordered dismissal without further elaboration. *See* 365 U.S. at 268. The government then filed a second complaint and prevailed on the merits. When the case returned to this Court for the second time, the petitioner argued that the first judgment of dismissal was res judicata as to the second complaint, relying on *precisely* the theory that Lockheed invokes in this case – viz, "that the second denaturalization proceeding was barred under Rule 41(b) of the Federal Rules of Civil Procedure by the failure of the District Court on remand of the first proceeding to specify that the dismissal was 'without prejudice' to the filing of a new complaint." 365 U.S. at 268.

This Court rejected the petitioner's argument, holding that the dismissal of the first complaint was "a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b)." 365 U.S. at 285. The Court refused to read into the language of Rule 41(b), which does not either in its text or in the accompanying advisory notes evidence an intent to change the law of res judicata, "a purpose to change" the rule that governed res judicata before the adoption of the Federal Rules of Civil Procedure – the "common-law principle" that "dismissal on a ground not going to merits was not ordinarily a bar to a

subsequent action on the same claim." 365 U.S. at 285-86.[28] To the contrary, "[a]ll of the dismissals enumerated in Rule 41(b) which operate as adjudications on the merits – failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law – primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them." *Id.* The Court therefore logically "confine[d]" the rule's application "to those situations where the policy behind the enumerated grounds is equally applicable," i.e., to cases in which "the defendant has been put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits." *Id.* at 287. In particular, the Court read the "jurisdictional" exception to Rule 41(b) to encompass those dismissals in which the district court did not exercise its "jurisdiction" to reach the merits of the case, and rejected as "misconceive[d]" the petitioner's contention that the exception is limited "to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter." *Id.* at 285.

Costello forecloses Lockheed's argument under Rule 41(b). If a district court holds, as in this case, that a complaint has been filed outside one state's statute of limitations, the court's order of dismissal is "for lack of jurisdiction" for the purposes of Rule 41(b). The statute of limitations is manifestly "a ground not

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[28] Under the common law, the Court explained, "'there must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit.'" *Costello*, 365 U.S. at 285 (quoting *Haldeman v. United States*, 91 U.S. 584, 585-86 (1875)). If the suit was instead "'disposed of on *any ground* which did not go to the merits of the action, the judgment rendered will prove no bar to another suit.'" *Id.* at 286 (emphasis added) (quoting *Hughes v. United States* 71 U.S. (4 Wall.) 232, 237 (1866)).

going to merits" and dismissal on that basis pretermits not only the court's examination of the merits but also any burden on the defendant to prepare a defense. *See Costello*, 365 U.S. at 285-87. Just as important, neither the text of Rule 41(b) nor the accompanying Advisory Committee Notes evidence an intent to supplant the long-settled holding of *Dupasseur* and its progeny that the effect of a statute-of-limitations dismissal is governed by the forum state's law. *See* Part I, *supra*. *Accord Burgess v. Cohen*, 593 F. Supp. 1122, 1124 (E.D. Va. 1984) ("Rule 41(b) was not intended to include a dismissal on limitations grounds as an unqualified decision upon the merits" (citing *Costello*)).

Since 1961, when *Costello* was decided, Rule 41 has been amended five times. None of those amendments altered the "jurisdictional" exception or otherwise called *Costello* into question. Indeed, in 1963, Rule 41(b) was amended to add dismissal "for lack of an indispensable party" to the list of dismissals withdrawn from the district court's discretion. Relevant for present purposes, the 1963 amendment's Advisory Committee notes explain: "Such a dismissal does not bar a new action, for it is based merely 'on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim.' *See Costello v. United States*, 365 U.S. 265, 284-88 (1961); *Mallow v. Hinde*, 12 Wheat. (25 U.S.) 193 (1827); Clark, CODE PLEADING 602 (2d ed. 1947); Restatement of Judgments § 49, comm. a, b (1942)."

The cited portion of the Restatement of Judgments, in particular comment a to Section 49, indicates beyond a shadow of a doubt that Rule 41(b) was not intended to cover a statute-of-limitations dismissal:

> A judgment for the defendant may be based upon the ground that the plaintiff is not entitled to maintain an action in the State in which the judgment is rendered and not on a ground which would be applicable to an action in other States. In such a case the judgment is on the merits to the extent that it will bar the plaintiff from maintaining

> a further action in that State, but it is not on the merits so far as actions in other States are concerned. Thus, if the plaintiff brings an action to enforce a claim in one State and the defendant sets up the defense that the action is barred by the Statute of Limitations in that State, the plaintiff is precluded from thereafter maintaining an action to enforce the claim in that State. He is not, however, precluded from maintaining an action to enforce the claim in another State if it is not barred by the Statute of Limitations in that State.

Restatement of Judgments § 49, cmt. a (1942); *see also Western Coal & Min. Corp. v. Jones*, 167 P.2d 719, 724 (Cal. 1946) (quoting § 49, cmt. a, at length and setting forth California's policy that "a judgment determining that an action is barred by the statute of limitations is not one on the merits and therefore is not res judicata" because "the running of the statutory period does not extinguish the cause of action, but merely bars the remedy").

The Advisory Committee's reference to comment a of Section 49 of the Restatement in the context of Rule 41(b) is highly revealing. "[I]n ascertaining [the Rules'] meaning the construction given to them by the Committee is of weight." *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946); *see also Torres v. Oakland Scavenger Corp.*, 487 U.S. 312, 316 (1988); *Schiavone v. Fortune*, 477 U.S. 21, 30 (1986). Accordingly, even if Rule 41(b) as a general matter addressed the preclusive effect of federal judgments, it would not accord preclusive effect to a statute-of-limitations dismissal.[29]

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[29] Well-reasoned decisions of the courts of appeals have long attested to the broad scope of Rule 41(b)'s "jurisdictional" provision in light of *Costello*. *Pack v. Yusuff*, No. 99-60283, 2000 U.S. App. LEXIS 15843, at *17 (CA5 July 10, 2000) (holding that dismissal with prejudice should be limited to preliminary jurisdictional issue reached by district court); *In re Swine Flu Immuniz. Prods. Liab. Litig.*, 880 F.2d 1439, 1441 (CADC 1989) (a dismissal

The facts of this case illustrate perfectly that statute-of-limitations dismissals fall squarely within *Costello*'s rationale and holding. In response to Semtek's California state court complaint, Lockheed immediately removed to federal court and, within days, moved to dismiss on the basis of the applicable California statute of limitations. Not only was Lockheed not put to the burden of preparing a defense but the parties never conducted any discovery or factual development at all. To the contrary, as Lockheed explained in its brief in opposition, "Semtek's own complaint and representations established that California's two-year statute of limitations had expired." BIO 2. It is equally clear that, in granting Lockheed's motion, the district court did not consider the merits of Semtek's claims, as

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may be "jurisdictional" "in the sense that it prevents the court from reaching the merits of the complaint, and not in the sense that it would be no bar to that plaintiff bringing a later case"); *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 680 n.18 (CA5 1985) ("Because of the obvious effects that accompany a dismissal with prejudice, the line between on-the-merits adjudications and those based on jurisdictional defects must lean towards a broader definition of 'jurisdictional' under Rule 41(b)."); *McCarney v. Ford Motor Co.*, 657 F.2d 230, 233 (CA8 1981) (explaining that Costello holds that "the term jurisdiction and rule 41(b) should not be interpreted in a rigid and narrow manner" and therefore encompasses dismissals for lack of standing); *Knox v. Lichtenstein*, 654 F.2d 19, 22 (CA8 1981) ("If the first suit was dismissed for defect of the pleadings, or parties, or a misconception of the form of proceeding, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered should not bar another suit."). Although some courts disagree, those decisions have been the subject of appropriate criticism. *See Sack v. Low*, 478 F.2d 360, 363 (CA2 1973) (Friendly, C.J.) (criticizing Second Circuit authority according limitations dismissal res judicata effect based on Second Circuit precedent from 1930s and the 1949 Restatement of Judgments, under which "dismissal on that ground represented only a determination that the particular remedy the plaintiff had sought to pursue was unavailable, leaving him free to seek to enforce the right in another forum if the limitations of that forum allowed," and which "is still the general rule"); *see also Criales v. American Airlines*, 105 F.3d 93, 95 (CA2 1997) (more recent Second Circuit decision reading *Costello* broadly and collecting cases in support of that view).

Lockheed sought dismissal on only a single basis – expiration of the statute of limitations. *See Koch v. Rodlin Enters., Inc.*, 223 Cal. App.3d 1591, 1596 (App. 1990) ("Termination of an action by a statute of limitations is deemed a technical or procedural, rather than a substantive, termination. 'Thus the purpose served by dismissal on limitations grounds *is in no way dependent on nor reflective of the merits* – or lack thereof – in the underlying action.' (quoting *Lackner v. LaCroix*, 25 Cal.3d 747, 751-52 (1979), and citing additional California authorities) (emphasis added)).

Accordingly, under *Costello*, Rule 41(b) does not deem the California district court's dismissal of Semtek's complaint to be res judicata as to Semtek's Maryland action. Instead, applying *Dupasseur*, the Maryland courts should have looked to California law, which would hold that the limitations dismissal does not bar another suit by Semtek in another jurisdiction.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Full Faith and Credit Clause, Art. IV, § 1, provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

The Full Faith and Credit statute, 28 U.S.C. § 1738, provides in relevant part:

> . . . The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Federal Rule of Civil Procedure 41(b) provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and

any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(5)

No. 99-1551

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IN THE

Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

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4 of 42

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. FEDERAL RULE OF CIVIL PROCEDURE 41(b) CONTROLS WHETHER A JUDGMENT OF DISMISSAL IN A DIVERSITY CASE IS "ON THE MERITS" FOR CLAIM PRECLUSION PURPOSES. 6

A. The Unambiguous Terms Of Rule 41(b) "Cover The Point In Dispute" Under Hanna And Establish That The Dismissal In This Case Was "On The Merits." 8

B. Semtek's Arguments Urging That Rule 41(b) "Should Not Be Read" To Control Whether A Diversity Judgment Is "On The Merits" Are Unavailing. 15

1. Rule 41(b)'s operation is entirely consistent with the objectives of res judicata doctrine. 16

2. While Rule 41(b) determines for a state court whether a federal dismissal is "on the merits," state courts retain full discretion to apply state rules of procedure to their own proceedings. 20

3. Rule 41(b) fully applies to dismissals based on expiration of the statute of limitations 23

TABLE OF CONTENTS
(continued)

Page

4. Because Rule 41(b) controls the issue in dispute, the California rule has no application. 24
   a. Rule 41(b) and the California rule cannot both be given effect in this case, and Rule 41(b) therefore controls. 24
   b. Semtek's analysis of the state and federal interests in issue and of Erie considerations is both irrelevant and erroneous. 29
      i. Interests of first forum. 30
      ii. Interests of the second forum. 33
      iii. Federal interests. 34
      iv. Erie analysis. 36
   C. Rule 41(b) Does Not Exempt Dismissals on Statute of Limitations Grounds From "On The Merits" Treatment. 39
   D. Rule 41(b) Is Valid Under The Rules Enabling Act And The Constitution. 44

II. THE CONCLUSION THAT RULE 41(b) CONTROLS THE ISSUE IN THIS CASE IS UNAFFECTED BY DUPASSEUR v. ROCHEREAU. 46

CONCLUSION 50

TABLE OF AUTHORITIES

Page(s)

CASES

Allie v. Ionata,
503 So.2d 1237 (Fla. 1987) 41

Answering Service, Inc. v. Egan,
728 F.2d 1500 (D.C. Cir. 1984) 35

Beegan v. Schmidt,
451 A.2d 642 (Me. 1982) 41

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,
402 U.S. 313 (1971) 48

Boaz v. Mutual Life Insurance Co.,
146 F.2d 321 (8th Cir. 1944) 11

Budinich v. Becton Dickinson & Co.,
486 U.S. 196 (1988) 27

Burgess v. Cohen,
593 F. Supp. 1122 (E. D. Va. 1984) 42

Burlington Northern Railroad Co. v. Woods,
480 U.S. 1 (1987) .... passim

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.,
498 U.S. 533 (1991) .... passim

Byrd v. Blue Ridge Rural Electric Cooperative,
356 U.S. 525 (1958) 25, 38

Cemer v. Marathon Oil. Co.,
583 F.2d 830 (6th Cir. 1978) 12

Cone v. West Virginia Pulp & Paper Co.,
330 U.S. 212 (1947) 13

TABLE OF AUTHORITIES
(continued)

Page(s)

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 10

Corrado v. Providence Redevelopment Agency,
320 A.2d 331 (R.I. 1974) 41

Costello v. United States,
365 U.S. 265 (1961) 39, 42

Creech v. Town of Walkerton,
472 N.E.2d 226 (Ind. Ct. App. 1984) 41

Dennis v. Fiscal Court,
784 S.W.2d 608 (Ky. Ct. App. 1990) 41

Deposit Bank of Frankfort v. Board of Councilmen,
191 U.S. 499 (1903) 12, 48

DeVargas v. Montoya,
796 F.2d 1245 (10th Cir. 1986), *overruled on other grounds, Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987) 41

Discount Homes, Inc. v. McFarlane,
16 Va. Cir. 306 (Va. Cir. Ct. 1989) 41

Dozier v. Ford Motor Co.,
702 F.2d 1189 (D.C. Cir. 1983) 42

Dupasseur v. Rochereau,
88 U.S. (21 Wall.) 130 (1874) ..... passim

Eastern Credit Ass'n v. Estate of Braxton,
215 A.2d 485 (D.C. 1965) 41

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Federated Department Stores, Inc. v. Moitie,
452 U.S. 394 (1981) ..... passim

First Call, Inc. v. Capital Answering Service, Inc.,
898 P.2d 96 (Mont. 1995) 41

Fluhr v. Allstate Insurance Co.,
447 N.E.2d 1254 (Mass. App. Ct. 1983) 41

Foran v. USAA Casualty Insurance Co.,
427 S.E.2d 918 (S.C. Ct. App. 1993) 41

Gardner v. LaFollette,
343 N.W.2d 830 (Wis. Ct. App. 1983) 41

Gasperini v. Center for Humanities, Inc.,
518 U.S. 415 (1996) ..... passim

Gillespie v. Johnson,
209 S.E.2d 143 (W. Va. 1974) 41

Goddard v. Security Title Insurance & Guaranty Co.,
92 P.2d 804 (Cal. 1939) 20, 30

Gonsalves v. Bank of America,
105 P.2d 118 (Cal. 1940) 35

Guidry v. Bayly, Martin & Fay,
545 So. 2d 567 (La. Ct. App. 1989) 41

Haislip v. Riggs,
534 F. Supp. 95 (W.D.N.C. 1981) 41

Hanna v. Plumer,
380 U.S. 460 (1965) ..... passim

Health Cost Controls, Inc. v. Washington,
187 F.3d 703 (7th Cir. 1999) 10

TABLE OF AUTHORITIES
(continued)

Page(s)

Heck v. Humphrey,
512 U.S. 477 (1994).....5, 21

Heiser v. Woodruff,
327 U.S. 726 (1946).....48

Hill v. Wooten,
279 S.E.2d 227 (Ga. 1981).....41

Jordan v. Kansas City,
929 S.W.2d 882 (Mo. Ct. App. 1996).....41

Kern v. Hettinger,
303 F.2d 333 (2d Cir. 1962).....34, 35, 36

Koch v. Rodlin Enterprises,
223 Cal. App. 3d 1591 (1990).....30

LaBarbera v. Batsch,
227 N.E.2d 55 (Ohio 1967).....41

Lackner v. LaCroix,
602 P.2d 393 (Cal. 1979).....30

Livingston v. Estate of Bias,
673 P.2d 1197 (Kan. Ct. App. 1984).....41

Matsushita Electronic Industries Co. v. Epstein,
516 U.S. 367 (1996).....5, 34

Nasser v. Isthmian Lines,
331 F.2d 124 (2d Cir. 1964).....12

Nitz. v. Nitz,
456 N.W.2d 450 (Minn. Ct. App. 1990).....41

Northwest Airlines, Inc. v. Transport Workers Union,
451 U.S. 77 (1981).....49

TABLE OF AUTHORITIES
(continued)

Page(s)

Opinion of the Justices,
558 A.2d 454 (N.H. 1989).....41

Palmer v. Hoffman,
318 U.S. 109 (1943.....25

Partee v.Phelps,
840 S.W.2d 512 (Tex. App. 1992).....41

Pavelic & LeFlore v. Marvel Entertainment Group,
493 U.S. 120 (1989).....8, 15, 17

Penfield Co. v. S.E.C.,
330 U.S. 585 (1947).....49

Penn v. Iowa State Board of Regents,
577 N.W.2d 393 (Iowa 1998).....41

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995).....13, 40, 42

PRC Harris, Inc. v. Boeing,
700 F.2d 894 (2d Cir. 1983).....42

Ragan v. Merchants Transfer & Warehouse Co.,
337 U.S. 530 (1949).....26

Reed v. Allen,
286 U.S. 191 (1932).....19

Rein v. David A. Noyes & Co.,
665 N.E.2d 1199 (Ill. 1996).....41

Ritchey v. Upjohn Co.,
139 F.3d 1313 (9th Cir. 1998).....31

Rose v. Town of Harwich,
778 F.2d 77 (1st Cir. 1985).....41, 42

TABLE OF AUTHORITIES
(continued)

Page(s)

S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District,
60 F.3d 305 (7th Cir. 1995).....29

Santos v. Todd Pacific Shipyards Corp.,
585 F. Supp. 482 (C.D. Cal. 1984).....30

Shoup v. Bell & Howell Co.,
872 F.2d 1178 (4th Cir. 1989).....42

Shupe v. Ketting,
No. 18145-4-III, 2000 Wash. App. LEXIS 1782
(Wash. Ct. App. 2000).....41

Sibbach v. Wilson & Co.,
312 U.S. 1 (1941).....46, 49

Smith v. Russell Sage College,
429 N.E.2d 746 (N.Y. 1981).....41

Stewart Organization, Inc. v. Ricoh Corp.,
487 U.S. 22 (1988).....7, 8, 29

Stoll v. Gottlieb,
305 U.S. 165 (1938).....5

Toucey v. New York Life Insurance Co.,
314 U.S. 118 (1941).....48

Walker v. Armco Steel Corp.,
446 U.S. 740 (1980)..... passim

Willy v. Coastal Corp.,
503 U.S. 131 (1992 13

STATUTES

28 U.S.C. § 1738.....5

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 2072.....13, 44, 49

U.S. Const. Art. IV, § 1.....5

OTHER AUTHORITIES

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8 James Wm. Moore et al., *Moore's Federal Practice* § 41.02 (3d ed. 2000).....46

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TABLE OF AUTHORITIES
(continued)

Page(s)

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RULES

C.D. Cal. R. 14.6.....14

Fed. R. Civ. P. 1.....12

Fed. R. Civ. P. 41(a).....11, 12

Fed. R. Civ. P. 41(b) ..... passim

Fed. R. Civ. P. 59.....1, 11

Fed. R. Civ. P. 60.....12

STATEMENT OF THE CASE

This case arises out of the decision of petitioner Semtek International Inc. ("Semtek") to bring its suit against respondent Lockheed Martin Corporation ("Lockheed"), a Maryland corporation, in the California courts. The California statute of limitations had expired, prompting dismissal of the action by a federal district court sitting in diversity. Semtek then sought to file precisely the same lawsuit against Lockheed again, this time in Maryland, a forum with a more generous statute of limitations. But as the court below correctly found, the plain terms of Federal Rule of Civil Procedure 41(b) direct that the dismissal of Semtek's California action by the federal district court was "on the merits" and entitled to res judicata effect.

1. In February 1997, Semtek filed its first lawsuit against Lockheed in California state court, alleging business torts. Pet. App. 48a. Lockheed, an out-of-state defendant, removed the case to federal district court based on diversity of citizenship. *Id.*

Lockheed moved under Rule 12(b)(6) to dismiss Semtek's suit on the ground that California's two-year statute of limitations had expired. The district court granted the motion. The dismissal order specified that the action was "DISMISSED WITH PREJUDICE," Pet. App. 58a, and the judgment reiterated that the dismissal was "on the merits and with prejudice," Pet. App. 59a. Semtek raised no objection to the court's decision to enter the judgment "on the merits," and did not move to amend or clarify the judgment. *See* Fed. R. Civ. P. 59(e).

Semtek appealed the dismissal to the Ninth Circuit, but did not contend on appeal that the district court had erred by rendering the judgment "on the merits" and did not object in any way to the form of the judgment. On February 25, 1999, the Ninth Circuit affirmed the district court dismissal. Pet.

App. 3a. Semtek chose not to petition for certiorari from that judgment.

2. a. In July 1997, while its Ninth Circuit appeal was pending, Semtek filed a second lawsuit against Lockheed in the Circuit Court for Baltimore City, raising business tort claims identical to those it alleged in California. Pet. App. 3a. Lockheed sought an injunction in the California district court barring Semtek from litigating claims in Maryland that the California court had already dismissed. Pet. App. 4a. The district court declined to exercise its discretion to enjoin the Maryland litigation, observing that it was "not convinced that the single action filed by [Semtek] in Maryland rises to the level of vexatious relitigation" warranting relief under the All Writs Act, 28 U.S.C. §1651(a), and that Lockheed could assert a defense of res judicata in the Maryland proceedings. Pet. App. 71a.

b. Lockheed then filed a motion in the Maryland trial court to dismiss the Maryland action on grounds of res judicata. Opposing the motion, Semtek argued that the California district court's dismissal was not "on the merits" and thus not entitled to claim preclusive effect. The Maryland court agreed with Lockheed and granted its motion. Pet. App. 36a-47a.

The court began by identifying the Federal Rule of Civil Procedure that speaks to whether a federal dismissal is "on the merits" for preclusion purposes: Rule 41(b), which provides in relevant part that "'unless the Court in its order for dismissal otherwise specifies, a dismissal . . . other than [one] for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.'" Pet. App. 39a (quoting Fed. R. Civ. P. 41(b)). The court held that the preclusive effect of the California federal court dismissal was governed by the Federal Rule directly on point, rather than by a California common-law rule suggesting that dismissal of a claim on limitations

grounds by a state court would not be "on the merits." Pet. App. 40a-46a. And the "plain language" of Rule 41(b), the court found, made clear that the California federal court's dismissal was an "adjudication on the merits" and hence entitled to res judicata effect. Pet. App. 39a.

c. Semtek then, for the first time, moved in the California district court to amend that court's judgment – by then 18 months old – to specify that the dismissal was *not* on the merits, which would have the effect under Rule 41(b) of changing the judgment to one without claim preclusive consequences. With full knowledge that the Maryland action had been dismissed on the basis of claim preclusion, the district court declined to change its judgment. The Ninth Circuit also denied Semtek's motions. Pet. App. 11a-12a.

3. Semtek appealed the Maryland trial court judgment dismissing the Maryland action on res judicata grounds. The Maryland Court of Special Appeals affirmed, agreeing with the trial court that Federal Rule 41(b), and not California res judicata law, governed whether the federal court dismissal was "on the merits" for preclusion purposes. Pet. App. 12a-16a, 19a-21a, 23a-30a. The court accordingly found that the district court's dismissal "was a judgment on the merits and was entitled to . . . preclusive effect." Pet. App. 34a. The Maryland Court of Appeals denied certiorari.

SUMMARY OF ARGUMENT

Semtek presents this case as one about federalism and *stare decisis*. It is not. This case is about textualism and nothing more – in particular, the plain text of Federal Rule of Civil Procedure 41(b). This Court gives the Federal Rules of Civil Procedure their plain text meaning, *see, e.g., Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 540-41 (1991), and the terms of Rule 41(b) squarely govern this case: the federal court dismissal of Semtek's California suit was "an adjudication upon the merits," Fed. R. Civ. P. 41(b), and thus is entitled to claim pre-

clusive effect. Semtek's indiscriminate array of arguments asserting that the terms of Rule 41(b) do not control, some of which would require no less than simply reading the Rule out of the Rules of Civil Procedure altogether, are unavailing. And *Hanna v. Plumer*, 380 U.S. 460 (1965), long ago established that where a Federal Rule of Civil Procedure addresses the issue in dispute, there can be no federalism-based objection to the application of the Rule in a diversity case if, as is undisputed here, the Rule represents a valid exercise of rulemaking authority. Nor would affirming the judgment require the Court to overrule *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), or to confront any questions of *stare decisis* whatsoever. This case, in short, begins and ends with the unambiguous terms of Rule 41(b).

Semtek nonetheless defers any discussion of Rule 41(b) until the final section of its brief. Semtek starts instead with an extended discussion of *Dupasseur*, a decision issued more than 60 years before promulgation of the Federal Rules of Civil Procedure and directly linked to an era in which state procedures governed federal proceedings under the now-obsolete Conformity Act, and a decision supplanted by Rule 41(b) in respect to the precise issue in this case. Tellingly, Semtek does not contend that Rule 41(b) is inapplicable *because of* the decision in *Dupasseur*. Semtek's Rule 41(b) arguments instead concentrate, as they must, on the terms and operation of the Rule. As a result, any attempt to revive *Dupasseur* and the rule in effect prior to the establishment of the Federal Rules – *viz.*, that the preclusive effect of a federal court diversity judgment is determined by the law of the state in which the federal court sits – is entirely contingent on Semtek's ability to establish independently that Rule 41(b) fails to address whether a judgment of dismissal in a diversity case is "on the merits" for preclusion purposes. That effort, as we elaborate herein, falls well short.

ARGUMENT

The Full Faith and Credit Clause and Statute, U.S. Const. Art. IV, § 1; 28 U.S.C. § 1738, require state and federal courts to give state court judgments the same preclusive effect they would receive in the courts of the rendering State. *See, e.g., Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996). While the judgments of federal courts do not fall within the four corners of the Clause or the Statute, "[i]t has long been established that the judgments of the federal courts are to be accorded full faith and credit when a question of their recognition arises in a state court or in another federal court." Restatement (Second) Judgments § 87 cmt. a (1982); *see, e.g., Stoll v. Gottlieb*, 305 U.S. 165 (1938). That requirement is one of federal law. *See* Restatement (Second) Judgments § 87 ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court.").

It is the content of that federal law that is in issue here – in particular, whether it consists of federal preclusion rules or instead incorporates the rules of the state in which the rendering federal court sits. *See id.* § 87 cmt. b; Restatement (Second) Conflict of Laws § 94 cmt. f, § 95 cmt. h (1988 revisions). There is no dispute in respect to federal question judgments; federal standards control their preclusive effect. *See Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994); *Stoll*, 305 U.S. at 170-75. The issue in this case concerns diversity judgments, and more specifically, one particular aspect of diversity judgments: the circumstances in which a judgment of dismissal in a diversity case is "on the merits," one of the basic elements of claim preclusion analysis.

Those elements are well established. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Because the parties and claims in

this action are identical to those in the suit dismissed by the California federal court, this case implicates only the "on the merits" issue. It raises no questions regarding whether federal or state standards control other aspects of a diversity judgment's preclusive effect, such as privity or mutuality of the parties or identity of the claims or issues. The distinction is significant, because those elements are not governed by a Federal Rule of Civil Procedure. The "on the merits" question, by contrast, is controlled by the terms of Rule 41(b).[1]

I. FEDERAL RULE OF CIVIL PROCEDURE 41(b) CONTROLS WHETHER A JUDGMENT OF DISMISSAL IN A DIVERSITY CASE IS "ON THE MERITS" FOR CLAIM PRECLUSION PURPOSES.

The question in this case is whether federal preclusion rules or state preclusion rules control when determining if the dismissal of an action by a federal court sitting in diversity is "on the merits." The choice between a federal rule and a state rule in a diversity case typically turns on the familiar *Erie* analysis, *see Erie Railroad Co. v. Tompkins*, 304

[1] The "on the merits" requirement has become somewhat mislabeled. Many types of dismissals are now accorded preclusive effect even if there has been no full-fledged merits analysis of the substance of the claims. This trend is the result of the liberalization of opportunities for amending and correcting pleadings and the increased emphasis on judicial administration and fairness to defendants. *See, e.g.*, Restatement (Second) Judgments § 19 cmt. a. The treatment of dismissals for failure to state a claim on the pleadings, which once posed no bar to relitigation but now generally preclude a subsequent action, *see Moitie*, 452 U.S. at 399 n.3; Restatement (Second) Judgments § 19 cmt. d, presents a good example. While its title has lost some of its descriptive value, the "on the merits" requirement remains an integral aspect of claim preclusion analysis, and the term "on the merits" still "often appears in statute, rule of court, case, and commentary," Restatement (Second) Judgments § 19 rep. note, including, as is especially pertinent here, in California law and in the terms of Federal Rule 41(b). The consequences of an "on the merits" judgment are the same in all jurisdictions, *i.e.*, that the judgment is entitled to preclusive effect.

U.S. 64 (1938), which generally entails evaluating the federal and state rules by reference to the dual objectives of discouraging undue forum-shopping and avoiding inequitable administration of the law. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427-28 (1996); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

But that analysis takes a back seat where, as here, a Federal Rule of Civil Procedure speaks to the issue. *See Hanna*, 380 U.S. at 469-70. The well-settled framework in cases involving a Federal Rule of Civil Procedure, established in *Hanna v. Plumer* and reiterated in a number of subsequent decisions, holds that the Rule controls in a diversity case if it "cover[s] the point in dispute" and infringes "neither the terms of the [Rules] Enabling Act nor constitutional restrictions." *Hanna*, 380 U.S. at 470-71; *see Gasperini*, 518 U.S. at 427 n.7; *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1, 4-5 (1987). In those circumstances, "the Federal Rule applies regardless of contrary state law." *Gasperini*, 518 U.S. at 427 n.7. It is only if the Federal Rule does not "cover[] the point in dispute" that the "'relatively unguided'" *Erie* inquiry might become relevant. *Hanna*, 380 U.S. at 470-71; *see Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26-27 & n.6 (1988).

The framework established in *Hanna* governs the analysis in this case. Accordingly, the question for the Court is whether Federal Rule of Civil Procedure 41(b) covers the point in dispute and represents a valid exercise of rulemaking authority under the Rules Enabling Act and the Constitution. *Hanna*, 380 U.S. at 470-71. If so, the Rule "applies regardless of contrary state law," *Gasperini*, 518 U.S. at 427 n.7, and there is no need to resort to an *Erie* analysis, *see Hanna*, 380 U.S. at 469-70. *See* 19 Charles Alan Wright et al., *Federal Practice and Procedure* ("Wright & Miller") § 4508, at 248-49 (2d ed. 1996).

Semtek turns the inquiry upside-down. It begins by introducing and defending the pre-Federal Rules standard of *Dupasseur* according to considerations generally relevant to *Erie* analysis and irrelevant under *Hanna*, such as the effect on forum-shopping and equitable administration of the law and the weight of state and federal interests. *See* Pet. Br. 11-28. Semtek only afterward turns to examining whether Rule 41(b) addresses the issue in this case. *Id.* at 34-50. The latter question comes first, however, *see, e.g., Stewart Org.*, 487 U.S. at 27 n.6; 19 Wright & Miller § 4504, at 47-48, and it is dispositive here.

A. The Unambiguous Terms Of Rule 41(b) "Cover The Point In Dispute" Under *Hanna* And Establish That The Dismissal In This Case Was "On The Merits."

The first question under *Hanna* is whether the Federal Rule in issue "cover[s] the point in dispute," *Hanna*, 380 U.S. at 470, which calls for a determination of "whether, when fairly construed, the scope of [the] Federal Rule . . . is sufficiently broad to . . . control the issue before the court," *Burlington Northern*, 480 U.S. at 4-5 (internal quotation marks omitted). This case presents no difficult issue on that score. The straightforward terms of Rule 41(b) control whether a federal court dismissal, including in a diversity case, is "on the merits." Indeed, the Rule admits of no other interpretation.

1. This Court "give[s] the Federal Rules of Civil Procedure their plain meaning. As with a statute, [the] inquiry is complete if" the Court "find[s] the text of the Rule to be clear and unambiguous." *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 540-41 (1991) (internal quotation marks omitted); *see Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 123 (1989); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980). The terms of Rule 41(b) are "clear and unambiguous," and they squarely address the circumstances in which a federal dismissal is "on the merits."

The Rule's title makes explicit that it governs the "effect" of an involuntary dismissal, *see* Fed. R. Civ. P. 41(b) (entitled "Involuntary Dismissal: Effect Thereof"), and the Rule describes that effect as follows:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and *any dismissal not provided for in this rule*, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, *operates as an adjudication upon the merits*.

Id. (emphasis added). The evident purpose of the Rule, as its title signals, is to establish clearly the "effect" of a dismissal regarding whether it "operates as an adjudication upon the merits" for preclusion purposes. *Id.*; *see* 9 "Wright & Miller" § 2373.

The Rule divides involuntary dismissals into three groups: (1) dismissals "for lack of jurisdiction, for improper venue, or for failure to join a party"; (2) dismissals "under this subdivision," *i.e.*, for "failure of the plaintiff to prosecute or to comply with these rules or any order of the court" (so-called "penalty dismissals"); and (3) "any dismissal not provided for in this rule." Because a judgment for the defendant generally entails a dismissal of the action, the third, all-purpose category of "any dismissal not provided for in this rule" encompasses summary judgments under Rule 56, judgments dismissing the action for failure to state a claim

under Rule 12(b)(6), and most means by which a defendant obtains judgment in its favor.[2]

The Rule is straightforward in its operation and clear in its consequences. The general rule, which applies both to the catch-all category of "any dismissal not provided for in this rule" and to the category of penalty dismissals "under this subdivision," is that the judgment "operates as an adjudication upon the merits" unless "the court in its order otherwise specifies." Fed. R. Civ. P. 41(b). The Rule thus erects a default presumption that those dismissals are "on the merits" absent a contrary specification by the court, which typically would take the form of a statement that the dismissal is "without prejudice" to a subsequent action. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (dismissal "without prejudice" is "a dismissal that does not operate as an adjudication upon the merits and thus does not have a res judicata effect") (internal quotation marks omitted). But the Rule categorically excepts from "on the merits" treatment the three types of dismissals in the remaining category – for "lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19." Fed. R. Civ. P. 41(b). Dismissals on those three grounds only preclude relitigation of the same issue, but can never have claim preclusive effect. *See* 9 Wright & Miller § 2373, at 411-12; Restatement (Second) Judgments § 20 cmt. d. In short, a dismissal for one of those three reasons is never "on the merits," whereas all other dismissals are "on the merits" unless the court says otherwise.

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[2] *See Health Cost Controls, Inc. v. Washington*, 187 F.3d 703, 706 (7th Cir. 1999) (per Posner, C.J.) ("A judgment in favor of a plaintiff is a statement of the relief [being] ordered; if in favor of the defendant, it is ordinarily a statement that the plaintiff's suit is being dismissed; in either case the judgment is the bottom line. Summary judgment is not relief. It is merely a procedural premise for relief. The relief is whatever the party moving for summary judgment was seeking and the court agrees the party is entitled to.") (citations omitted).

The treatment of voluntary dismissals in a different section of Rule 41 – Rule 41(a) – informs the rationale behind the Rule's treatment of involuntary dismissals under Rule 41(b). Rule 41(a) allows for three types of voluntary dismissals: by the plaintiff prior to service of a responsive pleading, by a stipulation signed by all the parties thereafter, or by order of court at any time. In light of the circumstances that typically attend a voluntary dismissal, Rule 41(a) establishes the opposite default presumption from Rule 41(b), *i.e.*, that a voluntary dismissal is "without prejudice" to a subsequent action unless otherwise specified. *See* Fed. R. Civ. P. 41(a)(1)-(2). Both Rule 41(a) and Rule 41(b) thus serve the beneficial purposes of establishing an appropriate default rule, of affording the rendering court discretion to tailor the preclusive effect of a dismissal to the circumstances of the case, and of making unmistakably clear both to litigants and to construing courts whether a dismissal is to be considered "on the merits" in a subsequent action.

2. The "on the merits" consequences of a dismissal under Rule 41 are not permanently cast in stone upon entry of the judgment. Federal Rule of Civil Procedure 59(e) provides for "motion[s] to alter or amend a judgment." Rule 59(e), in fact, was added to the Code specifically to authorize a court to designate after a dismissal has been entered whether the judgment is "with prejudice" or "without prejudice" or to reverse any such specification already made.[3]

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[3] The Advisory Committee Notes reveal that Rule 59(e) was added in response to the decision in *Boaz v. Mutual Life Insurance Co.*, 146 F.2d 321 (8th Cir. 1944), and to "make[] clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry." Fed. R. Civ. P. 59, adv. comm. notes (1946 amendment). *Boaz* addressed the authority of a district court that had entered a judgment of dismissal "without prejudice" to change the preclusive effect of the judgment (in response to a motion filed by the defendant two days later) to reflect that the dismissal was "with prejudice."

In addition, the parties can raise on appeal any questions relating to the preclusive effect of a judgment or to the district court's specification that a judgment is with or without prejudice, with review generally conducted under an abuse of discretion standard. *See* 9 Wright & Miller § 2376. Finally, Rule 60 allows motions for relief from a final judgment, either on grounds of clerical mistake, Fed. R. Civ. P. 60(a), or on grounds such as inadvertence, fraud, excusable neglect, surprise, changed circumstances, or "any other reason justifying relief from the operation of the judgment," Fed. R. Civ. P. 60(b).[4]

3. While Semtek presents an array of arguments asserting that Rule 41(b) "should" be read otherwise – which we take up in detail below – a plain text reading of the Rule's unambiguous terms permits but one conclusion: the federal court's dismissal of Semtek's California action was "upon the merits" and thus is entitled to claim preclusive effect.

To begin with, the plain terms of the Rule suggest no limitation on its application that might be thought to encompass the dismissal in this case. In particular, there is no suggestion in the text that dismissals in diversity cases somehow fall outside the scope of the Rule. To the contrary, the Rule speaks in general terms of "an action," Fed. R. Civ. P. 41(a)(1)-(2), 41(b), the Federal Rules broadly govern "*all* suits of a civil nature," Fed. R. Civ. P. 1 (emphasis added), and the Rules Enabling Act presumes that the Rules apply

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[4] Except in highly unusual circumstances, a party seeking to alter the preclusive effect of a judgment must obtain relief from the rendering court or on appellate review. *See Deposit Bank of Frankfort v. Board of Councilmen*, 191 U.S. 499, 512 (1903); Restatement (Second) Judgments § 80 cmt. a (stating "the general principle that relief from a judgment should be sought in the court that rendered the judgment"). Courts have applied that principle in cases involving dismissals controlled by Rule 41(b). *See Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 n.1 (6th Cir. 1978); *Nasser v. Isthmian Lines*, 331 F.2d 124, 127-28 (2d Cir. 1964).

generally to "cases in the United States district courts," 28 U.S.C. § 2072(a). "This expansive language contains no express exceptions and indicates a clear intent to have the Rules . . . apply to all district court civil proceedings." *Willy v. Coastal Corp.*, 503 U.S. 131, 134-35 (1992); *see* 19 Wright & Miller § 4508, at 238 (referring to "the objective, embodied in the Federal Rules and endorsed by statute, of a uniform procedural system applicable in all civil actions in the federal courts *regardless of the basis of subject-matter jurisdiction*") (emphasis added). In fact, this Court has assumed that Rule 41 applies in diversity cases. *See Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 & n.5 (1947) (stating in diversity case that plaintiffs could voluntarily dismiss without prejudice pursuant to Rule 41(a)).

The particular ground of the dismissal entered by the California district court – the expiration of the statute of limitations – does not implicate any of the three blanket exceptions from "on the merits" treatment, *viz.*, dismissals for lack of jurisdiction, for improper venue, or for failure to join a party. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) ("a dismissal on statute-of-limitations grounds" is "a judgment on the merits") (citing Rule 41(b)).[5] As a result, "[u]nless the court in its order . . . otherwise specifie[d]," the dismissal "operate[d] as an adjudication upon the merits." Fed. R. Civ. P. 41(b). Far from "specifying otherwise," the district court made expressly clear in its order – to the point of twice highlighting the language in block capital letters – that the matter was "DISMISSED WITH PREJUDICE." Pet. App. 58a. And the court reiterated in its judgment in unmistakable language that the action was "dismissed in its entirety on the merits and with prejudice." Pet. App. 59a.

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[5] Semtek's contention that a dismissal on statute of limitations grounds constitutes a "dismissal for lack of jurisdiction" is without merit. *See infra* § I.C.

Despite having received ample notice of the preclusive effect of the dismissal, Semtek did not object to the court's decision to render the dismissal "with prejudice," *see* C.D. Cal. R. 14.6, and did not file a motion under Rule 59(e) to alter or amend the judgment.[6] In its appeal to the Ninth Circuit, moreover, Semtek made no contention that the district court erred by entering the judgment "on the merits," and raised no questions regarding the preclusive effect of the judgment. Semtek also elected not to petition for certiorari from the Ninth Circuit's affirmance of the district court's "on the merits" dismissal.

Indeed, Semtek took no action in respect to the district court's dismissal until after its subsequent action in Maryland state court already had been dismissed on res judicata grounds. At that point, Semtek filed motions in both the Ninth Circuit and the district court seeking to reverse the preclusive effect of the dismissal to one without prejudice, alleging that the judgment reflected a "clerical" mistake. *See* Pet. App. 11a. Those courts, with full knowledge that the Maryland action had been dismissed on account of the California district court judgment, denied Semtek's motions. Accordingly, the Maryland Court of Special Appeals had no choice but to find, under the unambiguous and controlling terms of Rule 41(b), that the district court dismissal was "an adjudication upon the merits" and thus preclusive of the current action. Fed. R. Civ. P. 41(b).

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[6] Semtek's suggestion that it was not afforded any opportunity to object to the judgment is puzzling. *See* Pet. Br. 4-5. Semtek appears to suggest that it had no opportunity to object to the judgment *before* it was entered; but Rule 59(e) and the applicable Local Rule allow for filing a motion to alter the judgment *after* its entry.

B. Semtek's Arguments Urging That Rule 41(b) "Should Not Be Read" To Control Whether A Diversity Judgment Is "On The Merits" Are Unavailing.

Semtek contends that Rule 41(b) "should not be read as deciding" whether a federal diversity judgment is "on the merits" and hence claim preclusive. Pet. Br. 34. Semtek presents an array of arguments in support of that proposition in essentially undifferentiated fashion, some of which suggest that Rule 41(b) should not be read to apply in any case at all, some of which suggest that Rule 41(b) should not be read to apply when the recognizing forum is a state court, some of which suggest that Rule 41(b) should not be read to apply to dismissals on statute of limitations grounds, and some of which suggest that Rule 41(b) should not be read to apply in this case in view of the significant state interests ostensibly involved. *See* Pet. Br. 34-44.

Those arguments share a common failing, one that undermines them at the very outset. The question for the Court is not, as Semtek would have it, how Rule 41(b) "should be read." The question is what the Rule in fact says. *See Business Guides*, 498 U.S. at 549 ("[O]ur task is not to decide what the [Federal Rule] should be, but rather to determine what it is."); *Pavelic & LeFlore*, 493 U.S. at 126. As to the latter question, the terms of Rule 41(b) are unambiguous, and they explicitly control when a federal court dismissal "operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b). Semtek's various arguments suggesting how the Rule "should be read" do not demonstrate otherwise.

Those arguments share another shortcoming. While each contends that Rule 41(b) "should not be read" to control in this case, none directs that the governing rule should be the one urged by Semtek, *i.e.*, that the preclusive effect of a diversity judgment should be measured by the law of the state in which the diversity court sits. Most, in fact, draw no dis-

tinction between federal question cases and diversity cases, and so cannot substantiate the diversity-specific rule pressed by Semtek. Semtek's arguments suggesting how Rule 41(b) "should be read" thus not only fail to comport with the text of Rule 41(b); those arguments also fail to support the rule Semtek favors.

1. Rule 41(b)'s operation is entirely consistent with the objectives of res judicata doctrine.

Semtek's principal attack against the application of Rule 41(b) asserts that the Rule vests too much discretion in district courts and thereby breeds excessive uncertainty. *See* Pet. Br. 9-10, 39-44. According to Semtek, because the Rule applies to nearly all dismissals in federal court, and because the Rule allows the rendering court to trump the default presumption of "on the merits" treatment by "specifying otherwise" (except in cases involving the three categorical exceptions), *see* Pet. Br. 40-41, the Rule produces excessive uncertainty and disuniformity, which is "contrary to the principles of sound judicial administration and consistency that underlie the rules of civil procedure and the doctrine of res judicata," Pet. Br. 40. That reasoning is misconceived in a number of fundamental respects.

a. The first response to Semtek's basic critique of the way in which Rule 41(b) operates is that it belongs in a proposed amendment addressed to the Advisory Committee instead of in a brief addressed to this Court. By its own terms, the argument attacks the operation of the Rule as it is written. To be sure, Semtek labels the understanding of the Rule's operation that it finds unacceptable as "Lockheed's reading of Rule 41(b)." Pet. Br. 41. But that reading is nothing more than a straightforward application of the plain terms of the Rule. Indeed, Semtek volunteers no explanation of how "Lockheed's reading" could be incorrect, and offers no alternative interpretation of the Rule's unambiguous terms. To the contrary, Semtek takes pains to emphasize that

the Rule "applies to virtually all dismissals," establishes a "default" presumption, and permits courts to overcome the default presumption "by noting that the dismissal is 'without prejudice,'" *id.* at 40-41, all of which is accurate, and all of which causes the Rule to work in precisely the fashion that Semtek deems unacceptable. Semtek simply believes that the Rule as written is a bad idea.

The scope of Semtek's attack against Rule 41(b) cannot be overstated. Semtek's disapproval of the Rule's operation pertains not just to dismissals on statute of limitations grounds, or to dismissals in diversity cases, or even to all dismissals in federal court that precede the filing of a related action in state court. Semtek's argument extends to every application of Rule 41(b) in every set of circumstances – *i.e.*, all involuntary dismissals in the federal courts – including, for instance, where the actions in both the rendering and recognizing courts exclusively raise federal questions and both the rendering and recognizing courts are federal courts. Semtek thus would have the Court simply read Rule 41(b) out of the Rules of Civil Procedure altogether. A fundamental challenge of that sort to the very desirability of Rule 41(b) as it is written cannot assist Semtek in this Court. *See Business Guides*, 498 U.S. at 548-49 ("[T]his Court is not acting on a clean slate" in respect to the Federal Rules. . . . 'Our task is to apply the text, not to improve upon it.'") (quoting *Pavelic & Leflore*, 493 U.S. at 126)).[7]

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[7] The Wright and Miller treatise contains an argument similarly suggesting that the Rule should not be given its plain meaning, and that argument fails for the same reasons as Semtek's. The treatise submits that dismissals under the Rule should preclude relitigation of the same issue, but should have claim preclusive effect only upon an "[a]nalysis independent of the language of the rule." 18 Wright & Miller § 4435, at 334. That rationale by its own terms is at war with the text of the Rule. *See id.* at 332 ("language of the rule . . . seem[s] clear"). Because the "on the merits" element pertains only to *claim* preclusion, not issue preclusion, any rationale purporting to read the Rule as controlling only the *issue*

b. Semtek's critique of Rule 41(b), in any event, has the matter exactly backwards. Semtek conflates the problems of uncertainty that would arise in the absence of a clear rule governing whether to consider a dismissal "on the merits" *after* its entry, with the advantages of preserving discretion in district courts when deciding *before* the entry of a dismissal whether to render the judgment "on the merits." The whole purpose of Rule 41(b), and its principal virtue, is that it establishes a clear rule controlling whether the dismissal is "on the merits" following its entry for the benefit of the parties and any court adjudicating a subsequent action, while affording a district court flexibility to determine whether a dismissal should be "on the merits" in light of the particular circumstances of the case. *See* 9 Wright & Miller, § 2373, at 401-02 ("Indeed one of the most useful features of the rule is that it gives the court discretion about the effect of a dismissal and provides what the effect will be if the court fails to specify."); 18 Wright & Miller § 4413, at 106-07.

Semtek thus misses the mark entirely in invoking the notion that preclusion principles are "not amenable to loose discretionary determinations by the judiciary," Pet. Br. 43, and in seeking support in this Court's statement in *Federal Dep't Stores v. Moitie* that the "doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." 452 U.S. at 401; *see* Pet. Br. 43. The language in *Moitie* speaks to the undesirability of allowing the exercise of discretion by

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preclusive effects of a dismissal cannot make sense of the Rule's plain terms. Indeed, the Rule specifically provides that dismissals for lack of jurisdiction, improper venue, and failure to join a party cannot "operate as an adjudication upon the merits" for claim preclusion purposes, yet all three have issue preclusive effect. *See id.* at 333. The Rule's prescription that dismissals falling outside those three categories "operate as an adjudication upon the merits" therefore necessarily pertains to claim preclusion, not issue preclusion.

the *recognizing* court, not the *rendering* court. The case addressed whether a recognizing court should have freedom to refuse to accord preclusive effect to a prior judgment based on its own conceptions of "simple justice" and "public policy." *See* 452 U.S. at 397-98. The Court rejected that suggestion, explaining that it "'would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert.'" *Id.* at 398-99 (quoting *Reed v. Allen*, 286 U.S. 191, 201 (1932)).

Accordingly, Semtek's reliance on the "principles of sound judicial administration and consistency that underlie the rules of civil procedure and the doctrine of res judicata," Pet. Br. 40, is wholly misplaced. Those principles are undermined by uncertainty over a dismissal's preclusive effect *after* its entry, not – as Semtek mistakenly believes – by the exercise of discretion in the rendering court *before* its entry. Rule 41(b) appropriately prevents the former while preserving the latter.[8]

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[8] The same erroneous reasoning infects Semtek's submission that there "is no basis for displacing the clear and settled rules of res judicata and preclusion adopted by California and Maryland (and the forty-eight other states) in favor of [the] policy (if it can be called that) of substantial indeterminacy" expressed in Rule 41(b). Pet. Br. 43. That contention is doubly flawed. First, as just explained, the "indeterminacy" referred to by Semtek pertains to discretion in the rendering court – not the recognizing court – and so is perfectly in keeping with the objectives of res judicata doctrine. Second, the assumption that the preclusion rules adopted by states are more "clear and settled" than Rule 41(b) is incorrect. Rule 41(b) supplies a clear test for determining whether a dismissal is "on the merits," and the Rule "has been closely followed in over half the States and has had substantial impact in many others." Restatement (Second) Judgments § 19, rep. note. The preclusion rules in states that do not follow Rule 41(b), by contrast, can give rise to substantial uncertainty for the parties and construing courts. In California, for instance, the "on the merits" effect of a dismissal often remains unresolved until the *recognizing* court addresses the question, regardless of any specifica-

2. While Rule 41(b) determines for a state court whether a federal dismissal is "on the merits," state courts retain full discretion to apply state rules of procedure to their own proceedings.

Semtek contends alternatively that Rule 41(b) should not be read to control the "on the merits" treatment of a federal dismissal when the subsequent action takes place in state court. In Semtek's view, while the Rule identifies the circumstances in which a federal dismissal "operates as an adjudication upon the merits," Fed. R. Civ. P. 41(b), it fails to specify *where* the dismissal so "operates." *See* Pet. Br. 36. And "it would be odd" for the Rule to resolve whether a federal dismissal is "on the merits" when the second forum is a state court, Semtek submits, because no "decision has ever required a *state* court to apply the Federal Rules of Civil Procedure." *Id.* That rationale is flawed on several levels.

a. Contrary to Semtek's assertion, Rule 41(b) in no way requires state courts "to apply the Federal Rules of Civil Procedure." *Id.* Rule 41(b) applies instead in federal court by controlling whether a federal court's judgment of dismissal is "on the merits." State courts retain complete discretion to select and fashion rules of procedure governing their own proceedings, and they remain fully free to formulate their own rules directing when their own judgments are "on the merits."

To be sure, a state court assessing whether a prior federal dismissal was "on the merits" must make that determination by reference to Rule 41(b). But if Semtek means to suggest that the Rule cannot "apply" in state court even in that respect, Semtek is wrong. It is undisputed that federal rules control the res judicata effect of a federal judgment in federal

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tion by the rendering court designating that its judgment is "with prejudice" or "without prejudice." *See, e.g., Goddard v. Security Title Ins. & Guar. Co.*, 92 P.2d 804, 807-08 (Cal. 1939).

question cases, including where the recognizing forum is a state court. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994). State courts therefore must consult Rule 41(b) when confronted with a prior federal dismissal of a federal question case. But Rule 41(b) "applies" in state court no differently when a recognizing state court is faced with a diversity judgment: the argument necessarily can draw no distinction between federal question and diversity cases, as it relates exclusively to the Rule's effect on the recognizing state forum (Maryland here), not, as would be the case with a rationale focused on diversity judgments, to the Rule's effect on the state in which a rendering diversity court sits (California here). Semtek's reasoning therefore is unavailing.

b. Semtek's rationale falls short for another reason. It is common ground that the preclusive consequences of a federal judgment do not fluctuate according to the forum of the subsequent action. That is, a state court must accord a federal judgment the same preclusive effect as would a federal court – regardless of the answer to the separate question of which set of rules, federal or state, determine that effect. *See* 6 Wright & Miller § 1417, at 10-11 (2000 Supp.) ("When a federal judgment is asserted in a later state court action, the state court must give it the same binding effect that it would have in the federal court that rendered it.").

Semtek endorsed that principle below, and it assumes as much here. *See* Brief of Appellant Semtek (filed Nov. 30, 1998, Md. Ct. Sp. App.), at 19 ("[A] court must give a foreign judgment no more and no less force and effect than would the court which rendered it.") (emphasis omitted). Indeed, that is the general rule in preclusion analysis, *see, e.g.*, Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L.J. 289, 315-16 (1993) ("It is generally the practice of courts faced with determining the effects of a judgment to examine the res judicata law of the rendering court."), and a contrary view could not be squared with the obligation to

accord full faith and credit to federal judgments, *see* Restatement (Second) Judgments § 87 cmt a.[9] And a regime in which the preclusive consequences of a federal judgment would vary depending on whether a second action takes place in state court or federal court would entail excessive uncertainty and unpredictability for the parties and would breed undue forum-shopping in respect to the locus of the second suit.[10]

Once it is established that state courts must accord federal judgments the same preclusive effect as would a federal court, Semtek's emphasis on where a dismissal under Rule 41(b) "operates as an adjudication upon the merits" becomes immaterial. Semtek's argument does not (and could not) suggest that Rule 41(b) cannot supply the rule for determining whether a prior federal dismissal was "on the merits" even in a recognizing *federal* court. Semtek thus allows that its rationale presents no obstacle to the application of Rule 41(b) when both the rendering and recognizing courts are

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[9] *See also* Lilly, *supra*, at 316 ("Federal judgments are, generally speaking, entitled to the same kind of 'faith and credit' as are state court judgments . . . ."); Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L. J. 741, 744 (1976) (referring to "the clearly established rule that state courts must give full faith and credit to the proceedings of federal courts").

[10] The commentators relied upon by Semtek agree. *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 999 (1998) ("the applicable preclusion rules must be determinable [in the first forum] and must not depend on where the subsequent case is filed"); Lilly, *supra*, at 318 ("unless recognizing courts uniformly refer to the res judicata doctrines of the rendering tribunal, the initial litigants will have no reasonable means of predicting the consequences of the first suit"); Stephen R. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 797 & n.317 (1985) ("a system of preclusion rules for diversity judgments keyed to the locus of subsequent litigation would be hopeless, either because it would be unpredictable or because it would be, functionally, a sham").

federal. *See* Pet. Br. 37 n.23. But if state courts are required to accord a federal judgment the same preclusive effect as would a recognizing federal court, and the latter undisputedly applies Rule 41(b) in addressing the "on the merits" question, then state courts likewise must determine whether a federal dismissal was "on the merits" by reference to the terms of Rule 41(b). Any argument based on *where* a dismissal under Rule 41(b) "operates as an adjudication upon the merits" thus ultimately is of no assistance to Semtek.

3. Rule 41(b) fully applies to dismissals based on expiration of the statute of limitations.

Semtek also submits that Rule 41(b) should not be read to control the "on the merits" question in cases involving dismissals on statute of limitations grounds. That assertion relies exclusively on the suggestion of the Wright and Miller treatise that limitations dismissals are "too important" for their preclusive effect to be controlled by Rule 41(b), that the Rule "need mean only" that limitations dismissals have issue preclusive and not claim preclusive effect, and that a contextual, multi-factored analysis "independent" of Rule 41(b) should control whether a limitations dismissal is "on the merits." 18 Wright & Miller § 4441, at 372-73; *see* Pet. Br. 35, 37. The argument necessarily applies to all federal limitations dismissals, including in federal question cases, and including where the second forum is a federal court.

That rationale does not claim a basis in the text of Rule 41(b), as the Rule simply makes no specific mention of dismissals on statute of limitations grounds. And there is no suggestion in the treatise that limitations dismissals fall within one of the three categories of dismissals exempted from "on the merits" treatment, *viz.*, dismissals for lack of jurisdiction, improper venue, or failure to join a party. To the contrary, whereas a dismissal on those three grounds can never be "on the merits," the treatise submits that limitations dismissals sometimes warrant "on the merits" treatment, but

that the rule for identifying those circumstances should not be Rule 41(b). The argument reflects no more than an opinion of how limitations dismissals should be treated, not an effort to explain how they in fact are treated under controlling terms of Rule 41(b).[11]

4. Because Rule 41(b) controls the issue in dispute, the California rule has no application.

Semtek's final argument regarding how Rule 41(b) "should be read" relies on cases in which this Court found that there was "no Federal Rule which covered the point in dispute," and that state law governed the issue under the (therefore relevant) *Erie* test. *Hanna*, 380 U.S. at 470. Semtek's reliance on those cases is misplaced. Those decisions have no application when the terms of a Federal Rule squarely address the issue in the case. The Federal Rule controls in such circumstances, regardless of contrary state law. As a result, Semtek's analysis of the state and federal interests in issue and of the dual aims of *Erie* is inapposite. In any event, Semtek's analysis fundamentally misapprehends the state and federal interests involved in this case.

a. Rule 41(b) and the California rule cannot both be given effect in this case, and Rule 41(b) therefore controls.

In the course of explaining the inapplicability of *Erie* analysis when a Federal Rule of Civil Procedure speaks to the issue, this Court in *Hanna* distinguished a handful of previous decisions in which it had "held applicable a state rule in the face of an argument that the situation was governed by

[11] The treatise evidently would prefer a case-by-case analysis of whether a dismissal on limitations grounds is "on the merits" instead of what it characterizes as the "offhand" approach prescribed by Rule 41(b). *See id.* at 372-73. But Rule 41(b) preserves the discretion of district courts to specify that a dismissal is "without prejudice" precisely to permit case-specific tailoring of a dismissal's preclusive effect.

erned by one of the Federal Rules." *Hanna*, 380 U.S. at 470. The "holding of each such case was not that *Erie* commanded displacement of a Federal Rule by an inconsistent state rule," the Court made clear, "but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, *Erie* commanded the enforcement of state law." *Id.* Rule 41(b) "covers the point in dispute" here, however, and the line of cases distinguished in *Hanna* is of no relevance.

Semtek thus errs in relying on two such decisions, *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), and *Palmer v. Hoffman*, 318 U.S. 109 (1943). *See* Pet. Br. 38-39.[12] *Palmer*, in fact, was one of the decisions explicitly distinguished in *Hanna*. *See Hanna*, 380 U.S. at 470. *Palmer* rejected an argument that Federal Rule of Civil Procedure 8(c), which sets forth the affirmative defenses that must be alleged in an answer, also directs that the burden of proof in respect to those allegations rests with the defendant. According to the Court, "the fact that Rule 8(c) . . . makes contributory negligence an affirmative defense" does not also establish the burden of proof. *Palmer*, 318 U.S. at 117. "Rule 8(c) covers only the manner of pleading." *Id.* The separate issue "of the burden of establishing contributory negligence is a question of local law which federal courts in diversity of citizenship cases must apply" under *Erie*. *Id.* (citation omitted). *Hanna* quotes that entire passage in explaining that in *Palmer*, there was "no Federal Rule which covered the point in dispute." *Hanna*, 380 U.S. at 470.

Walker falls into the same camp. The Court based its reasoning there in large part on the fact that the decisions it

[12] Semtek also relies on *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), *see* Pet. Br. 38, but that case did not involve a Federal Rule.

had expressly distinguished in *Hanna* included *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), *see Hanna*, 380 U.S. at 470 n.12, which raised the same issue as *Walker*: whether Federal Rule of Civil Procedure 3, which provides that an action commences with filing of a complaint, also tolls a state statute of limitations in a diversity case. *See Walker*, 446 U.S. at 748-49.[13]

Under the relevant Oklahoma statute in *Walker*, the statute of limitations was tolled only upon service of the summons, not filing of the complaint. The Court found "no indication that the Rule was intended to toll a statute of limitations" or "to displace state tolling rules." *Id.* at 750-51. Instead, "Rule 3 governs the date from which various timing requirements of the Federal Rules begin to run." *Id.* at 751. Rule 3 and the state tolling provision could "exist side by side, therefore, each controlling its own intended sphere of coverage without conflict." *Id.* at 752. That was made clear by a different Oklahoma statute, which, just like Rule 3, provided that an action in Oklahoma courts commences upon filing of a complaint. Because the two Oklahoma provisions presumably worked together in state court, Rule 3 and the Oklahoma tolling statute likewise could "both apply in federal court in a diversity action." *Id.* at 752 n.13.

In *Walker* and *Palmer*, the terms of the Federal Rule did not address the point in dispute. The Federal Rule and state rule thus both could be given effect in the case, "each controlling its own intended sphere of coverage without conflict." *Id.* at 752. Neither decision, to be sure, gave the Federal Rule an unnecessarily expansive interpretation extend-

[13] The Court's analysis in *Walker* was "heavily" influenced by "the doctrine of *stare decisis*." *Id.* at 749. Indeed, the Court not only had addressed the same issue in *Ragan*, but also had reaffirmed *Ragan* in *Hanna*. According to the Court, a "litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence." *Id.*

ing beyond its plain text and into the sphere occupied by a state rule. That is what was meant by this Court's reliance on *Walker* for its observation in a subsequent case, *Gasperini v. Center for Humanities, Inc.*, that "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies." 518 U.S. 415, 427 n.7 (1996) (citing *Walker*).

Semtek invokes that remark here, *see* Pet. Br. 38, but does not rely on it to suggest any particular interpretation of Rule 41(b).[14] Nor could Semtek suggest an alternative interpretation of Rule 41(b). The observation in *Gasperini* in no way alters the basic obligation to abide by the plain text of the Rules. In fact, *Walker*, the decision on which the remark is based, makes clear that while "the scope of the Federal Rule [must be] sufficiently broad to control the issue before the Court," that "is not to suggest that the Federal Rules of Civil Procedure are to be narrowly construed." *Walker*, 446 U.S. at 749-50 & n.9. Rather, the "Federal Rules are to be given their plain meaning. If a direct collision with state law

[14] Semtek's later (and apparently unrelated) suggestion that the Court should "hold that the phrase 'upon the merits'" in Rule 41(b) "must be determined under the law of the state in which the federal diversity court sits," Pet. Br. 44, cannot be taken seriously. That is not an interpretation of the Rule; that is outright substitution of a new rule. Although Rule 41(b) of course contains the phrase "upon the merits," the Rule explains in detail precisely when a dismissal "operates as an adjudication upon the merits," Fed. R. Civ. P. 41(b), and the test prescribed by the Rule does not approach the one proposed by Semtek. Nor does Semtek attempt to explain how the phrase "upon the merits" could suggest an intent to borrow state law in diversity cases when the same words apply equally in federal question cases. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) ("In using the phrase 'final decisions' Congress obviously did not mean to borrow or incorporate state law. 'Final decisions' is not a term like 'property,' which naturally suggests a reference to state-law concepts; and the context of its use in § 1291 makes such a reference doubly implausible, since that provision applies to all federal litigation and not just diversity cases.") (citation omitted).

arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies." *Id.* at 750 n.9.

This Court subsequently articulated that test in *Burlington Northern Railroad Co. v. Woods* as follows:

> The initial step [under *Hanna*] is to determine whether, when fairly construed, the scope of [the] Federal Rule . . . is "sufficiently broad" to cause a "direct collision" with the state law, or implicitly, to "control the issue" before the court, thereby leaving no room for the operation of that law.

480 U.S. 1, 4-5 (1987) (quoting *Walker*, 446 U.S. at 749-50 & n.9).[15] Rule 41(b), as we have explained, does not just "implicitly control the issue before the court"; it does so explicitly, and it could not do so more directly. It specifies exactly when a federal dismissal "operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b).

In addition, the Rule is "sufficiently broad to cause a direct collision" with the California rule governing statute of limitations dismissals. Significantly, unlike in *Walker* and *Palmer*, there simply is no opportunity to give effect both to Rule 41(b) and to the California rule: Rule 41(b) says that the dismissal in this case was "on the merits"; the California rule would say that it was not. Applying the California rule

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[15] *Burlington Northern* held that Federal Rule of Appellate Procedure 38, which affords the courts of appeals discretion to assess "just damages" as a penalty for frivolous appeals, left no room for the operation in a diversity case of an Alabama law mandating imposition of a 10% penalty upon affirmance of any judgment for money damages that had been stayed pending appeal by payment of a bond. According to the Court, Rule 38's "discretionary mode of operation unmistakably conflicts with the mandatory provision of Alabama's affirmance penalty statute." 480 U.S. at 7. "Moreover, the purposes underlying the Rule are sufficiently coextensive with the asserted purposes of the Alabama statute to indicate that the Rule occupies the statute's field of operation so as to preclude its application in federal diversity cases." *Id.*

would entail giving no effect whatsoever to the plain terms of Rule 41(b). *See* 19 Wright & Miller § 4510, at 41 (2000 Supp.) ("the relevant question usually can be characterized as whether the federal rule and the state rule can be applied contemporaneously").[16] Rule 41(b) thus "controls the issue before the court, thereby leaving no room for the operation of [the state] law." *Burlington Northern*, 446 U.S. at 5 (internal quotation marks omitted).

b. Semtek's analysis of the state and federal interests in issue and of* Erie *considerations is both irrelevant and erroneous.

Because Rule 41(b) covers the issue, the "Federal Rule applies regardless of contrary state law." *Gasperini*, 518 U.S. at 427 n.7. The only remaining question under *Hanna* is whether the Rule represents a valid exercise of rulemaking authority under the Rules Enabling Act and the Constitution. *See id.*; *Burlington Northern*, 480 U.S. at 5. There is thus no warrant for assessing the relative strength of the state and federal interests or for conducting an *Erie* analysis. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 n.6 (1988) (evaluation of "whether application of federal judge-made law would disserve the so-called twin aims of the *Erie* rule" arises only "[i]f no federal statute or Rule covers the point in dispute"); *Hanna*, 380 U.S. at 470; 19 Wright & Miller § 4504, at 248. As a result, Semtek's extended treatment of those issues is inapposite. *See* Pet. Br. 15-28.

It is also incorrect. Semtek principally takes up the following subjects: (1) the interests of the state in which the diversity court sits (California); (2) the interests of the sec-

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[16] As Chief Judge Posner reasoned in *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 60 F.3d 305 (7th Cir. 1995), "the state rule [must] give way" if "both" the state and federal rules "cannot be applied to the same case." *Id.* at 312; *see Gasperini*, 518 U.S. at 427 n.7 (citing favorably the discussion in *S.A. Healy Co.*).

ond state forum (Maryland); (3) the federal interests; and (4) the dual aims of *Erie*. Even if those considerations were at all relevant to the disposition of this case, Semtek's analysis is flawed at every turn.[17]

i. Interests of first forum. In suggesting that the Court should interpret Rule 41(b) to avoid conflicting with ostensibly important state policies (but not offering any specific interpretation of the Rule), Semtek focuses on what it perceives to be California's interests. *See* Pet. Br. 38. According to Semtek, "California has deliberately provided that a statute-of-limitations dismissal does not preclude suit in another state with a longer limitations period." *Id.*

That is flatly incorrect, both in respect to California's rule and in respect to California's interests. The case announcing the California rule, and the only one to squarely address the issue, demonstrates why.[18] *Koch v. Rodlin Enter.*, 223 Cal. App. 3d 1591 (1990), involved plaintiffs whose first suit seeking to rescind a contract had been dismissed by a California court based on expiration of the statute of limitations. The same plaintiffs then filed another suit in California court arising out of the same transaction, but this time

[17] Semtek also submits that its preferred rule respects state law choices concerning res judicata principles, *see* Pet. Br. 16-19, but the discussion principally concerns elements of preclusion analysis not at issue here, such as mutuality of the parties.

[18] Semtek also cites two other California decisions in support of California's rule, but neither addresses whether a dismissal on statute of limitations grounds is "on the merits" for preclusion purposes. *See* Pet. Br. 6 (citing *Lackner v. LaCroix*, 602 P.2d 393 (Cal. 1979), and *Goddard v. Security Title Ins. & Guar. Co.*, 92 P.2d 804, 806 (Cal. 1939)). The California Supreme Court has yet to consider the issue. Prior to the California Court of Appeal decision in *Koch*, a federal district court had concluded that a statute of limitations dismissal is a judgment "on the merits" under California law. *See Santos v. Todd Pacific Shipyards Corp.*, 585 F. Supp. 482 (C.D. Cal. 1984). *Koch* opined that *Santos* was "wrongly decided." 223 Cal. App. 3d at 1596.

alleging a new legal theory, common law fraud. *See id.* at 1597. The court held that the dismissal on limitations grounds was not "on the merits" and therefore not res judicata as to the second action. *See id.* at 1595. In reaching that conclusion, the court not once alluded to any interest in preserving the plaintiffs' ability to file the same action in another state within that state's limitations period. To the contrary, the court's evident purpose was to permit the plaintiffs to assert a different legal theory arising out of the same factual circumstances in a subsequent California action without being barred by res judicata.[19] *See Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (9th Cir. 1998) (describing *Koch*).

California thus in no way has "deliberately provided that a statute-of-limitations dismissal does not preclude suit in another state with a longer limitations period." Pet. Br. 38. Semtek conflates California's res judicata rule with Maryland's choice-of-law rule. The California rule is *intra*jurisdictional, and concerns the ability of a party to allege a *different* legal theory in *California* courts following a dismissal on limitations grounds. The rule is not *inter*jurisdictional, and so does not concern the ability of a party to allege the *same* legal theory in *non-California* courts following a dismissal on limitations grounds. It is *Maryland* – not California, as Semtek mistakenly believes – that elects to follow a choice-of-law rule "under which a statute-of-limitations dismissal . . . does not preclude suit in a different jurisdiction where it is timely under" the jurisdiction's own limitations period. Pet. Br. 5; *see* Restatement (Second) Conflict of Laws § 142 (1988 revisions). California, of course, could not require Maryland (or any other state) to apply that

[19] The plaintiffs of course could not present the *same* legal theory again in California. A dismissal on statute of limitations grounds would at least have issue preclusive effect regarding whether the applicable limitations period had expired.

choice-of-law rule in the Maryland courts, and would have no cognizable state interest in doing so.[20]

The California rule, then, is not at all "directly on point," and was not at all "adopted to govern precisely a case such as this." Pet. Br. 33 n.21. Semtek filed claims in California alleging breach of contract, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and conspiracy. *See* Pet. App. 2a. After those claims were dismissed on limitations grounds, Semtek filed suit in Maryland alleging exactly the same four legal theories. *See* Pet. App. 3a. Whereas California's rule pertains to a second action sounding in a *different* legal theory and filed *in California*, Semtek's second action sounds in the *same* legal theories and was filed *elsewhere*. This case simply implicates no interest underlying the California rule.[21]

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[20] Semtek relies on outdated provisions of the Restatement governing the choice-of-law principles applicable to statute of limitations dismissals. *See* Pet. Br. 33-34 (citing Restatement (Second) Conflict of Laws §§ 142-143 (1971)). The new provision – which followed "extensive deliberations about the statute of limitations," Restatement (Second) Conflict of Laws, Foreword (1988 rev.) – narrows the circumstances in which states should allow suit after a prior action has been dismissed on limitations grounds in another jurisdiction, and generally moves away from treating statutes of limitations as procedural for choice of law purposes. *See generally id.* § 142 (1988 rev.).

[21] Semtek's misunderstanding of the California rule leads it even further astray. Semtek asserts that "California law would permit the second lawsuit to proceed," Pet. Br. 5, and that giving res judicata effect to the federal dismissal would "accord greater preclusive effect to a dismissal pursuant to California's statute of limitations . . . than California would give a dismissal by one of its own courts," *id.* at 24. That is incorrect. Because Semtek's second action raised the very same legal theories as its first, that action would have been precluded in the California courts. *See* note 19 *supra*.

ii. Interests of the second forum. Semtek's account of Maryland's interests likewise misses the mark. According to Semtek, applying Rule 41(b) "would invade the prerogative of [Maryland] to afford a plaintiff the opportunity to try her claims within the state's limitations period . . . where the earlier dismissal is based, as here, on limitations." Pet. Br. 22.

That analysis simply assumes away the question in this case. Maryland's interests are necessarily contingent on the rendering forum's preclusion rules: if the rendering jurisdiction considers limitations dismissals to be "on the merits," Maryland would be bound by full faith and credit to grant a limitations dismissal preclusive effect, no matter how much Maryland might wish that a second suit could go forward. Maryland's interests, that is, can only extend to "afford[ing] a plaintiff the opportunity to try her claims within the state's limitations period . . . where the earlier dismissal is based, as here, on limitations" *and is not on the merits*. Pet. Br. 22. So understood, Maryland's ability to effectuate its interests cannot be a *reason for* deciding between Rule 41(b) and California law. Instead, Maryland's ability to effectuate its interests is necessarily a *product of* that determination.

Semtek's rationale also fails on a more fundamental level. It appears to assume that imposing any sort of requirement on state courts to determine the preclusive effect of a federal judgment by reference to a federal rule would violate a state court's "prerogative[s]" in the area. Pet. Br. 22. Any such rationale would prove far too much. What Semtek seeks to impose on recognizing state courts is *also* a federal preclusion rule; it is just a different rule. The rule Semtek proposes would require all recognizing courts, including state courts, to measure the res judicata effect of a diversity judgment by reference to the rules of the state in which the rendering federal court sits. Leaving aside the merits or demerits of that specific rule, the point here is that the rule is necessarily one of federal law – in particular, fed-

eral common law arising from a decision of this Court – and it would equally trump a recognizing state court's discretion in determining the preclusive effect of a diversity judgment.

The question for the Court, then, is not *whether* a federal rule should determine the preclusive consequences of a federal judgment in a recognizing state court. The question is *what* should be the federal rule. And whatever may be the correct answer in respect to other aspects of preclusion analysis – none of which is directly controlled by a Federal Rule of Civil Procedure – the answer in respect to the "on the merits" element resides in the plain text of Rule 41(b).

iii. Federal interests. Semtek discounts the important federal interests at stake to the point of writing them off altogether. *See* Pet. Br. 25-28. That is wholly unwarranted. "[A] judgment court usually has a preemptive interest in applying its own rules of res judicata." Lilly, *supra*, at 307. That remains fully the case when the judgment court applies a different jurisdiction's substantive law. *See id.* at 326 ("Regardless of what substantive law, federal or state, controlled the claims and defenses in the suit, federal law should control the effects of a federal judgment."); Erichson, *supra*, at 1002-04. The general rule in choice-of-law and preclusion analysis holds that the preclusion rules of the forum control regardless whether the forum applied its own substantive law. Lilly, *supra*, at 326. The same rule governs when a state court decides a federal question: a federal court generally determines the preclusive effect of a state court judgment on a federal question by reference to the preclusion rules of the rendering state court. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996).

The emphasis on the forum court's preclusion rules stems from the forum's substantial interests in the area. The forum has a substantial finality interest in defining the contours of its judgments. *See Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962) ("One of the strongest policies a court can

have is that of determining the scope of its own judgments."); Restatement (Second) Judgments § 87 cmt. b (finality interests "go to the essence of the judicial function"). And the forum's preclusion rules reflect a considered balancing of a number of policies affecting the litigation strategy and behavior of parties in its courts. *See* Erichson, *supra*, at 999-1000, 1007; Lilly, *supra*, at 313. The policies of "conserving judicial resources and preventing use of the courts as instruments of harassment," for instance, are "the business of the forum court." *Answering Serv., Inc. v. Egan*, 728 F.2d 1500, 1507 (D.C. Cir. 1984) (Scalia, J., concurring). Because failure to enforce the forum's preclusion rules would undermine the forum's policies, "the federal judicial system has a legitimate interest in the litigation incentives created by federal preclusion law." Erichson, *supra*, at 1007.

The federal interests underlying federal preclusion law are particularly evident when formally expressed and codified in a Rule of Civil Procedure. *See* Richard H. Fallon et al., *Hart and Wechsler's The Federal Courts and the Federal System* 1473 (4th ed. 1996) ("where the federal court finds some affirmative federal policy with respect to preclusion – at least one that is embodied in the Federal Rules of Civil Procedure – that policy governs even if the case is a diversity case"); Lilly, *supra*, at 319-20 (Federal Rules "not only reflect strong federal policies, but they also represent formal enactments founded on Congressional authority"). For instance, there is a strong federal interest in ensuring that dismissals for failure to prosecute or to abide by court procedures and rulings are given the intended preclusive effect under Rule 41(b), or else they would lose all effectiveness. *See Kern*, 303 F.2d at 340; Burbank, *supra*, at 783. The Rule therefore controls in those circumstances even if state law, such as in California, *see Gonsalves v. Bank of America*, 105 P.2d 118 (Cal. 1940), provides that dismissals for failure to prosecute are not "on the merits."

The same logic extends to all dismissals under Rule 41(b). Rule 41(b) embodies the substantial interest of federal courts in defining the scope of their own judgments. *See* 18 James Wm. Moore et al., *Moore's Federal Practice* § 130.30, at 130-26.5 (3d ed. 1997); *Kern*, 303 F.2d at 340. And the important policies underlying the Rule would lose their force if the Rule were not followed in recognizing courts. *See* Lilly, *supra*, at 320 ("a dismissal with prejudice" under Rule 41(b) "would be largely ineffective if the plaintiff could renew his claims in another court"); Burbank, *supra*, at 780 ("the federal interest in uniform federal rules" governing the "on the merits" question is "sufficiently strong to rule out resort to state law"). As a result, even if state law should govern other aspects of preclusion analysis not controlled by a Federal Rule – such as the scope of the claims or causes of action precluded or the rules governing mutuality or privity of the parties – Rule 41(b) determines whether a federal dismissal "operates as an adjudication upon the merits" for preclusion purposes. *See* 18 Wright & Miller § 4472, at 726 ("Some res judicata results are controlled by the rules of civil procedure, which should be binding on all courts.").

iv. Erie analysis. *Erie* analysis is irrelevant in cases involving a Federal Rule. But even if *Erie*, rather than *Hanna*, supplied the relevant framework, *Erie* would not compel the result urged by Semtek here. To begin with, Semtek places excessive weight on whether application of Rule 41(b) would change the outcome from the one that would prevail in state court. *See* Pet. Br. 15-16, 21-22, 38. "'Outcome-determination' analysis was never intended to serve as a talisman," and "*every* procedural variation is 'outcome-determinative'" in the sense urged by Semtek. *Hanna*, 380 U.S. at 466-67, 468; 19 Wright & Miller § 4504, at 30-31. The relevant question under *Erie* is not whether application of the state law rule would change the outcome, but whether its application would "have *so important an effect* upon the fortunes of one or both of the litigants that failure to apply it

would unfairly discriminate against citizens of the forum State, or be likely to cause a plaintiff to choose the federal court." *Gasperini*, 518 U.S. at 428 (emphasis added) (internal quotation marks and alterations omitted).[22]

Semtek contends that the California rule entails substantial implications for forum-shopping and equitable administration of the law because a dismissal on limitations grounds in a California court would not preclude the action in Maryland. *See* Pet. Br. 21-22. In fact, however, "the difference between the two rules would be of scant, if any, relevance to the choice of a forum." *Hanna*, 380 U.S. at 469. Accepting Semtek's rationale would require presuming not only that parties base the selection of a forum on the preclusive effect of a possible dismissal, but also that they take into consideration the particular grounds on which the action might be dismissed, and consider further whether federal and state preclusion rules attach different preclusive consequences to any dismissal that might be entered on those grounds. And because the federal rule in issue, Rule 41(b), generally allows district courts discretion to tailor the preclusive effect of a dismissal to the circumstances of the case, the parties normally will not know in advance whether the federal and state rules in fact entail different outcomes.

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[22] It bears noting that the circumstances of this case do not implicate *Erie*'s core concerns. Because the case involves an out-of-state defendant's decision whether to remove an action to federal court, it does not raise concerns about forum shopping or inequitable administration of the law: both the plaintiff and defendant have a right to have the case heard in federal court – the former by filing there and the latter by removing. *See* 17 James Wm. Moore et al., *Moore's Federal Practice* § 124.06[1], at 124-37 (3d ed. 1997) ("The forum-shopping that concern[s] the Court is the unfairness of providing plaintiffs who can sue in federal court an advantage unavailable to non-diverse plaintiffs who must proceed in state court, or unavailable to defendants who have no choice.").

Unlike the typical *Erie* situation, moreover, the choice of forum would not affect the outcome in that case itself. The parties instead would have to look further into the future, as the forum choice could make a difference only in any subsequent action. What is more, because in this case a subsequent action in California would have been precluded even if a California state court heard the initial suit, *see* note 19 *supra*, the forum choice could have an outcome-determinative effect only in the event of a subsequent action filed *in a different state*. It is unlikely that litigants base their choice of a forum to any meaningful extent on the possibly disparate preclusive consequences of a conceivable dismissal that could be entered on a specific ground in a potential subsequent action that might be filed in a different state.

Finally, whatever may be the implications of the California rule for forum-shopping and equitable administration of the law, the substantial federal interests reflected in Rule 41(b) would compel application of the Rule, even assuming *Hanna* itself did not. *See Gasperini*, 518 U.S. at 437 (factoring federal interests into *Erie* analysis); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537-38 (1958) (same); Erichson, *supra*, at 1007 ("Even if concerns of forum-shopping and vertical uniformity might lead one to consider application of state law under *Erie*, . . . [i]f there is a countervailing federal interest, then courts must consider whether that federal interest overrides application of the state rule."). Whereas *Erie* questions typically involve a choice between state and federal rules that apply during the course of litigating an action, Rule 41(b) takes effect upon entry of a dismissal. "A critical event – the entry of judgment by an arm of the federal sovereign – provides the dominant federal interest, even in the diversity context." Lilly, *supra*, at 325. As a result, although *Erie* analysis and the weight of state and federal interests are irrelevant when a Federal Rule covers the point in dispute, an accurate understanding of those

interests and a proper application of *Erie* analysis would lead to the same conclusion: Rule 41(b) controls.

C. Rule 41(b) Does Not Exempt Dismissals on Statute of Limitations Grounds From "On The Merits" Treatment.

Semtek's fall-back position is that even if Rule 41(b) controls, the Rule "does not accord preclusive effect to the *type* of dismissal entered here: a dismissal under a statute of limitations." Pet. Br. 44. In Semtek's view, limitations dismissals fall within the exception from "on the merits" treatment for dismissals entered "for lack of jurisdiction." Fed. R. Civ. P. 41(b). That reasoning once again is at odds with the straightforward text of the Rule.

1. Semtek principally relies on *Costello v. United States*, 365 U.S. 265 (1961), which construed Rule 41(b)'s exception for "lack of jurisdiction" in the context of successive denaturalization proceedings. This Court ordered dismissal of the first proceeding because the government had failed to file an affidavit of good cause with the complaint, a prerequisite to initiation of denaturalization proceedings under applicable federal law. 356 U.S. 256 (1958). The district court's dismissal on remand did not state whether the judgment was with prejudice. The government then instituted a second proceeding, this time with the required affidavit, and the case again came before this Court. The Court held that "a dismissal for failure to file the affidavit of good cause is a dismissal 'for lack of jurisdiction,' within the meaning of the exception under Rule 41(b)," and so does not have claim preclusive effect. 365 U.S. at 285. According to the Court, the "lack of jurisdiction" exception "encompass[es] those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." *Id.*

a. Semtek's effort to apply *Costello* to statute of limitations dismissals is unavailing. To begin with, Semtek wholly

misapprehends the implications of its argument, which it perceives are as follows: "[U]nder *Costello*, Rule 41(b) does not deem the California's district court's dismissal of Semtek's complaint to be res judicata as to Semtek's Maryland action. Instead, applying *Dupasseur*, the Maryland courts should have looked to California law." Pet. Br. 50.

Semtek's conclusion cannot follow from its premise. Application of *Costello* would not mean that Rule 41(b) would drop out of the picture and that recognizing courts could then look to state law. Instead, Rule 41(b) would still apply, but its blanket exception for dismissals for "lack of jurisdiction" – rather than its default rule – would control. The result would be that *no* federal court dismissal on statute of limitations grounds could *ever* be "on the merits" for purposes of res judicata, including in federal question cases, and including in diversity cases even if the rules of the state in which the diversity court sits provide that limitations dismissals *are* or can be "on the merits" (as appears to be the case in a majority of states, *see infra* at 41). Contrary to Semtek's assumption, in short, *Costello* does not provide a bridge to state law.

b. Semtek also errs on the antecedent question whether *Costello* has any implications for limitations dismissals. This Court, specifically relying on Rule 41(b), established in a subsequent decision that "[t]he rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: *as a judgment on the merits*." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) (citing Fed. R. Civ. P. 41(b)) (emphasis added). The Court's reliance on Rule 41(b) for that conclusion in *Plaut* necessarily rules out any reliance on the prior decision in *Costello* for the opposite position, *i.e.*, that no limitations dismissal can ever constitute "a judgment on the merits" under Rule 41(b).

Indeed, there had long been a "clear trend toward giving claim-preclusive effect to dismissals based on statutes of limitations" by the time of the Court's statement in *Plaut*. *Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) (per Breyer, J.). And the law in a majority of states appears to be that statute of limitations dismissals are (or at least can be) "on the merits."[23] There is thus no warrant for adopting a strained construction of Rule 41(b) under which no federal limitations dismissal could ever be "on the merits."

Costello would have no implications for this case even otherwise. The courts that have addressed the question have

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[23] *See Eastern Credit Ass'n v. Estate of Braxton*, 215 A.2d 485, 486-87 (D.C. 1965); *Allie v. Ionata*, 503 So.2d 1237, 1242 (Fla. 1987); *Hill v. Wooten*, 279 S.E.2d 227, 228 (Ga. 1981); *Rein v. David A. Noyes & Co.*, 665 N.E.2d 1199, 1204-05 (Ill. 1996); *Creech v. Town of Walkerton*, 472 N.E.2d 226, 228 (Ind. Ct. App. 1984); *Penn v. Iowa State Bd. of Regents*, 577 N.W.2d 393, 399 (Iowa 1998); *Livingston v. Estate of Bias*, 673 P.2d 1197, 1199-1200 (Kan. Ct. App. 1984); *Dennis v. Fiscal Court*, 784 S.W.2d 608, 609 (Ky. Ct. App. 1990); *Guidry v. Bayly, Martin and Fay*, 545 So.2d 567 (La. Ct. App. 1989); *Beegan v. Schmidt*, 451 A.2d 642, 644 (Me. 1982); *Fluhr v. Allstate Ins. Co.*, 447 N.E.2d 1254, 1255 (Mass. App. Ct. 1983); *Rose*, 778 F.2d at 77 (applying Massachusetts law); *Nitz. v. Nitz.*, 456 N.W.2d 450, 452-53 (Minn. Ct. App. 1990); *Jordan v. Kansas City*, 929 S.W.2d 882, 886 (Mo. Ct. App. 1996); *First Call, Inc. v. Capital Answering Serv., Inc.*, 898 P.2d 96, 96-97 (Mont. 1995); *Opinion of the Justices*, 558 A.2d 454, 458 (N.H. 1989); *DeVargas v. Montoya*, 796 F.2d 1245, 1249 (10th Cir. 1986) (construing New Mexico law), *overruled on other grounds Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987); *Smith v. Russell Sage College*, 429 N.E.2d 746, 750 (N.Y. 1981); *Haislip v. Riggs*, 534 F. Supp. 95, 99 (W.D.N.C. 1981); *LaBarbera v. Batsch*, 227 N.E.2d 55, 63 (Ohio 1967); *Corrado v. Providence Redevelopment Agency*, 320 A.2d 331, 332 n.3 (R.I. 1974); *Foran v. USAA Casualty Ins. Co.*, 427 S.E.2d 918, 919 (S.C. Ct. App. 1993); *Partee v.Phelps*, 840 S.W.2d 512, 515 (Tex. App. 1992); *Discount Homes, Inc. v. McFarlane*, 16 Va. Cir. 306, 308 (Va. Cir. Ct. 1989); *Shupe v. Ketting*, No. 18145-4-III, 2000 Wash. App. LEXIS 1782, at *12-13 (Wash. Ct. App. 2000); *Gillespie v. Johnson*, 209 S.E.2d 143, 145 (W. Va. 1974); *Gardner v. LaFollette*, 343 N.W.2d 830 (Wis. Ct. App. 1983).

found that limitations dismissals do not fall within the "lack of jurisdiction" exception notwithstanding *Costello*. *See Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1181 (4th Cir. 1989); *PRC Harris, Inc. v. Boeing*, 700 F.2d 894 (2d Cir. 1983).[24] A failure to file suit within the statute of limitations is not a "failure to comply with a precondition requisite to the Court's going forward." *Costello*, 365 U.S. at 285. *Costello* interprets the "lack of jurisdiction" exception to encompass "curable defects," *i.e.*, a failure to satisfy a precondition that can "be remedied by occurrences subsequent to the original dismissal." *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (per Scalia, J.) (emphasis omitted); *see Rose*, 778 F.2d at 79-80 (per Breyer, J.) (exception for "lack of jurisdiction" covers "defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again"). The expiration of a limitations period by nature cannot be remedied by subsequent events: the lapse of time is not curable. *Costello* therefore has no application here.[25]

2. Semtek is left only with an inference it draws from a string citation in the Advisory Committee notes to Rule 41(b). The argument focuses on the Committee's notes in

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[24] Semtek relies on the district court decision in *Burgess v. Cohen*, 593 F. Supp. 1122 (E. D. Va. 1984), *see* Pet. Br. 47, but that ruling was superseded by the Fourth Circuit's subsequent decision in *Shoup*, 872 F.2d at 1178.

[25] Semtek's emphasis on whether Lockheed was put to the burden of preparing a defense, *see* Pet. Br. 49, proves too much. Dismissals for failure to state a claim often precede meaningful discovery and factual development, but they nonetheless generally constitute "on the merits" judgments for preclusion purposes. *See Plaut*, 514 U.S. at 228; *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981). At any rate, resolution of statute of limitations questions often requires substantial discovery and factual development. Allegations that fraudulent concealment should foreclose reliance on a statute of limitations defense, for instance, will often entail discovery and litigation.

connection with the 1963 amendment adding dismissals for failure to join an indispensable party to the list of dismissals exempted from "on the merits" treatment. A string citation in the notes identifies a number sources supporting the proposition that dismissals for failure to join a party should not bar a subsequent action, including the Restatement (First) Judgments § 49, comm. a, b (1942). Semtek considers the "Advisory Committee's reference to comment a of Section 49 of the Restatement" to be "highly revealing," Pet. Br. 48, and to "indicate beyond a shadow of a doubt that Rule 41(b) was not intended to cover a statute-of-limitations dismissal," *id.* at 47.

To the extent the citation of the Restatement comments in the Committee notes is "highly revealing," it is for the opposite reason. To be sure, *one* of the two cited Restatement comments contains a discussion about statute of limitations dismissals that Semtek repeats in its brief. But *both* of the cited comments specifically discuss the preclusive consequences of a dismissal for failure to join a party, the specific issue addressed by the 1963 amendments. *See* Restatement (First) Judgments § 49 comm. a, b. In fact, the two comments together submit that a dismissal for failure to join a party should have issue preclusive but not claim preclusive effect, exactly the result brought about by the amendments. Semtek thus would have the Court believe that the citation of the two Restatement comments was intended not to refer to the discussion in both comments providing direct support for the specific amendment at issue, but instead to incorporate into the Rule *sub silentio* the discussion in *one* of the comments about an unrelated subject. That is implausible.

The 1963 amendments are "highly revealing" in a broader sense. They illustrate that the proper way to add dismissals on a particular ground to the list of dismissals exempted from "on the merits" treatment is to amend the Rule, not to give the plain terms of the Rule an unnatural reading.

If the Advisory Committee intended to prescribe a distinct treatment of limitations dismissals, it would have said so explicitly, just as it did in 1963 with dismissals for failure to join an indispensable party. *Cf. Business Guides*, 498 U.S. at 545 ("Had the Advisory Committee intended to limit the application of the certification standard" in Rule 11, "it would surely have said so."). And even if it were desirable to exempt all limitations dismissals from "on the merits" treatment as a policy matter, "this Court will not reject the natural reading of a rule or statute in favor of a less plausible reading, even one that seems to . . . achieve a better result." *Id.* at 547. The most "natural reading" of Rule 41(b) – indeed, the only possible reading – is that limitations dismissals "operate as an adjudication upon the merits" unless the rendering court "otherwise specifies." Fed. R. Civ. P. 41(b).

D. Rule 41(b) Is Valid Under The Rules Enabling Act And The Constitution.

When a Federal Rule "cover[s] the point in dispute," *Hanna*, 380 U.S. at 470, the only remaining question is whether the Rule reflects a valid exercise of rulemaking authority under the Constitution and the Rules Enabling Act, 28 U.S.C. § 2072. *See Burlington Northern*, 480 U.S. at 4-5. Semtek at no point suggests that Rule 41(b) is invalid under either the Enabling Act or the Constitution. To the contrary, Semtek's fallback argument under the Rule necessarily presumes the Rule's validity. There is thus no contention before the Court that the Rule exceeds the scope of rulemaking authority under the Constitution or the Enabling Act.

Such a contention would fail in any event.[26] A challenge to the validity of a Federal Rule of Civil Procedure "has a large hurdle to get over," and can "succeed 'only if the Advi-

[26] Any challenge to Rule 41(b) under the Enabling Act or the Constitution of course necessarily would call the Rule's validity into question in all cases, not just diversity cases.

sory Committee, this Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions.'" *Business Guides,* 498 U.S. at 552 (quoting *Hanna*, 380 U.S. at 471). "Rules regulating matters 'which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either,' . . . satisfy [the] constitutional standard." *Burlington Northern*, 480 U.S. at 5 (quoting *Hanna*, 380 U.S. at 472). And "Rules which incidentally affect litigants' substantive rights do not violate" the Rules Enabling Act if "reasonably necessary to maintain the integrity" of the Federal Rules. *Id.* No Federal Rule has been invalidated under those standards, *see* 19 Wright & Miller § 4504, at 48, and no court has suggested that Rule 41(b) should be the first.

Rule 41(b) at least is "rationally capable of classification" as procedural.[27] The "rules of practice and procedure may and often do affect the rights of litigants," but Rule 41(b) "does not operate to abridge, enlarge, or modify the rules of decision by which [a] court will adjudicate [substantive] rights." *Hanna*, 380 U.S. at 465 (internal quotation marks omitted). The Rule plays no role in the substantive determination whether a dismissal should be awarded, but controls the preclusive effect of a dismissal entered for independent reasons. The Rule thus does not define the "rights and duties recognized by substantive law," but comprises part of "the judicial process for enforcing [those] rights and

[27] The Advisory Committee specifically addressed when promulgating Rule 41(b) whether the Rule "is really procedural" given that it "attempts to state the effect of a dismissal." American Bar Association, Proceedings of the Institute on Federal Rules, Cleveland, Ohio, 310 (1938) (remarks of Edgar Bronson Tolman, member of the Advisory Committee on Rules of Civil Procedure). The Committee concluded that the Rule was "procedural" based on an English decision "involv[ing] that very point." *Id.*; *see id.* at 306.

duties" and for "administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). In addition, Rule 41(b) promotes the integrity of the Federal Rules: preclusion rules work hand in hand with other procedural rules to control litigation in the forum. *See, e.g.*, Erichson, *supra*, at 961-62. Rule 41(b) thus presents no difficulty under the Rules Enabling Act or the Constitution. *See* 8 James Wm. Moore et al., *Moore's Federal Practice* § 41.02 (3d ed. 2000)

II. THE CONCLUSION THAT RULE 41(b) CONTROLS THE ISSUE IN THIS CASE IS UNAFFECTED BY *DUPASSEUR v. ROCHEREAU*.

Semtek does not contend that if Rule 41(b) covers the issue in this case and is valid, *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), nevertheless mandates a different result. Accordingly, the threshold and pivotal issue in this case concerns the applicability of Rule 41(b): if the Rule applies and is valid, that is end of the matter. *Dupasseur* has no bearing on those questions, and this case therefore raises no questions of *stare decisis*.[28]

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[28] Semtek's petition for certiorari presents the question whether *Dupasseur* is "still good law," and asks further, "what should be the res judicata effect of a statute of limitations dismissal in a diversity suit" if "*Dupasseur* is overruled or modified by this Court?" Pet. for Cert. i. The "res judicata effect of a statute of limitations dismissal in a diversity suit," as we have explained, is determined by Rule 41(b) – at least in respect to the "on the merits" question. Contrary to Semtek's assumption, however, that conclusion does not entail "overruling or modifying" *Dupasseur* or determining that *Dupasseur* is not "good law." The question whether a prior decision remains "good law" can be tested only in a case involving circumstances that the prior decision intends to control. *Dupasseur*, as we explain here, simply did not intend to establish the controlling standard when a Federal Rule of Civil Procedure is on point. Indeed, *Dupasseur* could not have done so. It is not that *Dupasseur* is no longer "good law"; it is that *Dupasseur* does not purport to control the resolution of this case.

1. *Dupasseur* arose at a time when federal courts applied state procedural law under the terms of the now-obsolete Conformity Act, and the decision was a direct product of – and is inextricably linked with – that period. *See* Degnan, *supra*, at 756-57, 768-69. The question in *Dupasseur* was whether a previous federal court proceeding was *in rem*, in which case it would bind nonparties (like Dupasseur) in a subsequent action. In the course of resolving that issue, the Court observed that the prior judgment had been entered in a diversity case, that the court's "proceedings were had in accordance with the forms and course of proceeding in the State courts" under the Conformity Act, and that the judgment "therefore" should be accorded the same preclusive effect as a "judgment[] of the State courts in a like case and under similar circumstances." *Dupasseur*, 88 U.S. (21 Wall.) at 135. The Court went on to find that the proceeding was not *in rem*. *Id.* at 137-38.

Dupasseur's understanding of the preclusive effect of a diversity judgment arose directly out of the decision's historical context. At the time, the Conformity Act required federal courts to apply state rules of procedure in virtually all federal proceedings.[29] Because the "proper scope of judgments is determined in large part by the procedures leading to their rendition," Degnan, *supra*, at 769, the Court naturally looked to state law when assessing the preclusive effect of a diversity judgment. *See id.* at 756-57; Restatement (Second) Judgments § 87 cmt. a ("Since procedural law largely determines the matters that may be adjudicated in an action, state law had to be considered in ascertaining the effect of a federal judgment" at the time of the Conformity Act.). *Dupasseur* did not address a choice between federal and state pre-

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[29] The only exception was in equity proceedings, and those "elicited no special notice of the problem of the governing law." Restatement (Second) Judgments § 87 cmt. a.

clusion law – because of the Conformity Act, there was no well-developed body of federal preclusion law to speak of.[30]

All of that changed in 1938 with the promulgation of the Federal Rules of Civil Procedure, made possible by the repeal of the Conformity Act and enactment of the Rules Enabling Act. *See* Restatement (Second) Judgments § 87 cmt. a; Degnan, *supra*, at 757. Because *Dupasseur* was grounded in the application of state rules of procedure, it was essentially superseded by the establishment of the Federal Rules. *See* 18 Wright & Miller § 4472, at 732-33; Degnan, *supra*, at 768. In fact, since the adoption of the Federal Rules neither *Dupasseur* nor any other decision has been cited by this Court even once for the proposition that state law determines the preclusive effect of a diversity judgment.[31]

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[30] *Deposit Bank of Frankfort v. Board of Councilmen*, 191 U.S. 499 (1903) is not to the contrary. *Deposit Bank* found that *Dupasseur* did not compel application of state law to determine the preclusive effect of a federal court judgment in a federal question case. *See id.* at 515-21. Although the Conformity Act applied to federal question cases, *Deposit Bank* does not call into question *Dupasseur*'s roots in the Act. The point here is that the use of state law procedures by the federal courts – and more particularly, the attendant paucity of independent federal procedures, including preclusion rules – led to the rule of *Dupasseur*, not that it compelled application of that rule in every circumstance.

[31] This Court has cited *Dupasseur* during that entire period only once for any reason, and that was in a footnote in support of the unrelated proposition that the res judicata effect accorded a federal judgment by a state court presents a federal question reviewable by this Court. *See Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129 n.1 (1941). Semtek's contention that the Court has implicitly reaffirmed *Dupasseur* through isolated statements in *Heiser v. Woodruff*, 327 U.S. 726 (1946), and *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313 (1971), *see* Pet. Br. 12 & n.7, is incorrect. For one thing, neither of those decisions addressed the preclusive effect of a diversity judgment. The statements in both *Heiser* and *Blonder-Tongue* pertain to the rules that should be applied by a *recognizing* diversity court when evaluating the preclusive effect of a prior judgment, not to the rules governing the preclusive effect of a *rendering* diversity court judgment in subsequent proceedings. *See* Degnan, *supra*, at 750-51. Even if *Heiser* and *Blonder-Tongue* addressed the issue in this case, the Court's treatment of the question as an open one – rather than one controlled by *Dupasseur* – is inconsistent with Semtek's reliance on those cases here.

That does not mean that state law can never control any aspect of the preclusive effect of a diversity judgment. It means instead that any decision selecting state rules over federal rules would come about not because of *Dupasseur*, but because of independent analysis under *Erie* and *Hanna*. *See* Restatement (Second) Judgments § 87 cmt. b; 18 Wright & Miller § 4472, at 733 ("the old rule should not be perpetuated without careful reexamination," particularly where "the civil rules" are "clearly intended to require preclusion").

2. *Dupasseur* can have no application where one of the Federal Rules is on point. The Federal Rules have "the force of a federal statute," *Sibbach*, 312 U.S. at 13, and the Rules Enabling Act specifically provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect," 28 U.S.C. § 2072(b). *Dupasseur* established a rule of federal common law, binding in all state (and federal) courts, directing that the preclusive effect of a diversity judgment is determined by the law of the state in which the diversity court sits. To the extent the common law rule of *Dupasseur* is "in conflict with" a subsequently promulgated Federal Rule, *Dupasseur* is "of no further force or effect." 28 U.S.C. § 2072(b); *see Penfield Co. v. S.E.C.*, 330 U.S. 585, 589-90 n.5 (1947) ("Where a Rule of Civil Procedure conflicts with a prior statute, the Rule prevails.").

This case thus presents no questions of *stare decisis* in respect to *Dupasseur*, and turns instead exclusively on the terms of Rule 41(b). *See Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 n.34 (1981) ("[O]nce Congress addresses a subject, even a subject previously governed by federal common law, . . . the task of the federal

courts is to interpret and apply statutory law, not to create common law."). As we have explained, Rule 41(b) controls the circumstances in which a federal court dismissal is "an adjudication upon the merits," Fed. R. Civ. P. 41(b), and it establishes that the dismissal of Semtek's California action by the diversity court was "upon the merits" for purposes of claim preclusion.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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SEMTEK INTERNATIONAL INCORPORATED,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS
OF MARYLAND

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TABLE OF CONTENTS

Table of Authorities ii

Reply Brief for the Petitioner 1

I. Rule 41(b) Does Not Control This Case 2

A. By Its Terms, Rule 41(b) Does Not Create a Federal Law of Res Judicata 3

B. The Rules Enabling Act Precludes Interpreting Rule 41(b) as Creating a Federal Law of Res Judicata 4

C. Lockheed's Interpretation of Rule 41(b) Would Produce Uncertainty 10

II. The Law of the Forum State Controls the Preclusive Effect of a Federal Diversity Judgment . 11

A. State Interests 12

B. Federal Interests 14

C. Forum Shopping 17

III. Even If Rule 41(b) Controlled, It Would Not Accord Preclusive Effect To Limitations Dismissals 18

Conclusion 20

TABLE OF AUTHORITIES

CASES

Baker v. General Motors Corp., 522 U.S. 222 (1998) 13
Bank of the United States v. Donnally, 33 U.S. (8 Pet.) 361 (1834) 2, 6
Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912) 11
Brent v. Bank of Washington, 35 U.S. (10 Pet.) 596 (1836) . 2
Commissioner v. Sunnen, 333 U.S. 591 (1948) 6
Costello v. United States, 365 U.S. 265 (1961) 18, 19
Deposit Bank v. Frankfort, 191 U.S. 499 (1903) . 2, 11, 12, 15
Dupasseur v. Rochereau, 88 U.S. (21 Wall.) 130 (1874) ..... passim
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 1
Federated Dep't Stores v. Moitie, 452 U.S. 394 (1981) 5
Felder v. Casey, 487 U.S. 131 (1988) 16
Gasperini v. Center for Humanities, Inc., 518 U.S. 415 (1996) 9
Guaranty Trust Co. v. York, 326 U.S. 99 (1945) 12, 15
Hanna v. Plumer, 380 U.S. 460 (1965) 6, 10
Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294 (1917) 5
Heck v. Humphrey, 512 U.S. 477 (1994) 4
Johnson v. City of Loma Linda, 5 P.3d 874 (Cal. 2000) ... 13
Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) ... 19
Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962) 16
Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941) 12, 15
Koch v. Rodlin Enterprises, 273 Cal. Rptr. 438 (Ct. App. 1990) 13, 19

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Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 5
M'Cormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825) .. 12
O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) 14
Palmer v. Hoffman, 318 U.S. 109 (1943) 9
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 18
Ritchey v. Upjohn Drug Co., 139 F.3d 1313 (9th Cir.), *cert. denied*, 525 U.S. 963 (1998) 13
Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) 6
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United States v. United States Smelting Refining & Mining Co., 339 U.S. 186 (1950) 10
University of Tennessee v. Elliott, 478 U.S. 788 (1986) ... 15
Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 9
Wong Doo v. United States, 265 U.S. 239 (1924) 10

STATUTES

28 U.S.C. § 1652 14
Rules Enabling Act, 28 U.S.C. § 2072 ..... 6, 17
Pub. L. 100-702, 102 Stat. 4648 8

RULES

FRCP 3 9
FRCP 8(c) 9
FRCP 14 8
FRCP 41(b) ..... passim
FRCP 59(e) 3

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Restatement of Judgments (1942) 2, 17, 19

Restatement (Second) of Judgments (1982) 2, 3, 5, 14

S. Rep. No. 440, 70th Cong., 1st Sess. (1928) 7

S. Rep. No. 1174, 69th Cong., 1st Sess. (1926) 7

Tr. of Oral Arg. 13

Uniform Conflict of Laws Limitations Act, 12 U.L.A. 46-49 (Supp. 1983) 19

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REPLY BRIEF FOR THE PETITIONER

In the courts of California, a judgment of dismissal founded on a state statute of limitations entails the limited right not to be sued on the same legal theory in another action *in that state*. According to the Maryland court below, however, by reason of Federal Rule of Civil Procedure 41(b), a federal diversity judgment of dismissal predicated on the same state limitations statute affords a right not to be sued on the same transaction or occurrence *anywhere in the country*. This holding is in error.

Rule 41(b) by its terms does not, and under the Rules Enabling Act could not, control the decision in this case. To be sure, Rule 41(b) supplies a procedure for identifying which federal judgments have the *potential* to be accorded preclusive effect under the relevant governing law. But Rule 41(b) does not create an entire federal law of res judicata.[1]

Instead, this Court should hold that this diversity judgment, involving a state-law limitations dismissal, should have the same preclusive effect as if it had been rendered by a state court in the first forum, under *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). If the matter is treated as one of federal common law, the pertinent state-law res judicata rule should be borrowed because there is no federal interest requiring the use of a nationally uniform rule governing the effect of a limitations dismissal.[2] Where the first forum, like California, follows the traditional rule that limitations dismissals do not have claim preclusive effect, the second forum is free to apply its own statute of limitations. Indeed, under this Court's full faith and credit decisions, the

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[1] To resolve this case, the Court need not address any issue other than the question presented: the preclusive effect of a limitations dismissal. Thus, this Court need not decide whether uniform federal law controls such issues as the finality or validity of diversity judgments.

[2] Alternatively, this Court could adopt, as a uniform federal rule governing the res judicata effect of a limitations dismissal, the traditional rule that such a dismissal does not preclude suit in another forum with a longer limitations period.

second forum would be free to do so even if the first forum treated the limitations dismissal as barring the plaintiff "from thereafter maintaining an action to enforce the claim in that State." Restatement of Judgments § 49, cmt. a (1942). *See Brent v. Bank of Washington*, 35 U.S. (10 Pet.) 596, 617 (1836); *Bank of the United States v. Donnally*, 33 U.S. (8 Pet.) 361, 370 (1834); Restatement (Second) of Judgments § 19, cmt. f (1982).

I. RULE 41(b) DOES NOT CONTROL THIS CASE

It is common ground that Rule 41(b) *does not* supply the answer to many questions regarding the preclusive effect of a diversity judgment, "such as privity or mutuality of the parties or identity of the claims or issues." Lockheed Br. 6; *see also id.* at 36 (allowing that state law could control "the scope of the claims or causes of action precluded or the rules governing mutuality or privity of the parties"). *See also* PLAC Br. 19 n.8 (acknowledging that state law controls "some" of the preclusive effects of a diversity judgment). But, according to Lockheed, Rule 41(b) *does* control this case involving the preclusive effect of a limitations dismissal. The distinction drawn by Lockheed cannot be maintained. There is no difference in principle between the question presented here (the proper legal and territorial scope of preclusion to be given to a limitations dismissal) and the question of privity, or mutuality, or the scope of a legal "claim." In diversity cases, all of these questions require an analysis of the state law governing the proper scope of preclusion and the impact of a dismissal on a subsequent action. If a judgment is conceived as a repository of rights that it is the province of preclusion law to protect, *see, e.g.*, *Deposit Bank v. Frankfort*, 191 U.S. 499, 520 (1903), the question is the scope of those rights under the relevant state law.

To argue that the "claims in this action are identical to those in the suit dismissed by the California federal court," Lockheed Br. 5-6, begs the question of the legal and territorial scope of the preclusion to be accorded to the California federal diversity judgment. This question should be answered by reference to the preclusion law of the forum state in which the diversity court sat

and to the full faith and credit obligations that would be owed to that forum state courts' judgments.[3]

A. By Its Terms, Rule 41(b) Does Not Create a Federal Law of Res Judicata

As Lockheed maintains, the question is "what [Rule 41(b)] in fact says." Lockheed Br. 15. The Rule says nothing about creating a federal law of res judicata. The phrase "upon the merits" has no fixed meaning and certainly no fixed meaning over time. It was abandoned by the Restatement (Second) of Judgments (1982) "because of its possibly misleading connotations." § 19, cmt. a. Even Lockheed admits that the phrase "has become somewhat mislabeled." Lockheed Br. 6 n.1. Although Lockheed attempts to equate a judgment "upon the merits" with one "entitled to res judicata effect" (*id.* at 1), this is sleight of hand, not legal argument. And it begs the real question: what is the source – federal law or state law – of the res judicata effect for which the judgment is eligible?

The most that can be said is that Rule 41(b) provides a procedure for identifying a federal judgment with the potential to bar another action as a matter of claim preclusion. Whether the judgment will so bar another action depends on the answers to other questions (including what law of preclusion will govern, the scope of that which is precluded, and the territorial scope to be given that rule of preclusion), as to all of which Rule 41(b) is silent. The "upon the merits" label is a mere datum, for whatever significance state law chooses to accord it.

To be sure, in federal question cases, the federal courts may treat that datum as dictating res judicata effect. But that is because there is a federal common law rule of res judicata, independent of Rule 41(b), which so provides. (Contrary to

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[3] Semtek is not "seeking to alter the preclusive effect of a judgment." Lockheed Br. 12 n.4. Nor is the question whether Semtek should have filed a Rule 59(e) motion to amend the California federal diversity judgment. The issue is what preclusive effect the judgment has.

Lockheed's suggestion (Lockheed Br. 20-21), the source of preclusion law in federal question cases is federal common law, not the Federal Rules. *See Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994).) In state-law cases, however, it is state law that determines whether the label triggers res judicata effect.

Interpreting Rule 41(b) as a procedural rule rather than as a font of substantive law does not "read Rule 41(b) out of the Rules of Civil Procedure altogether," as Lockheed wrongly argues. Lockheed Br. 17. We fully acknowledge that Rule 41(b) performs an important procedural function.[4] But this does not justify creating uniform federal law for all preclusion questions arising from federal diversity judgments. Far from representing an aberrant view (as Lockheed tries to suggest), our interpretation of Rule 41(b) is in fact shared by Wright & Miller and other esteemed commentators.[5]

B. The Rules Enabling Act Precludes Interpreting Rule 41(b) as Creating a Federal Law of Res Judicata

To rest an entire body of federal preclusion law upon the thin reed of the terse phrase, "upon the merits," would stretch Rule 41(b) to the breaking point. The law of preclusion is heavily substantive in nature and reflects important public policy choices. The "doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than

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[4] Contrary to PLAC's argument, the applicable source of preclusion law does not vary according to whether the recognizing court is federal or state. A recognizing federal court is not "forc[ed] ... to ignore Rule 41(b)" (PLAC Br. 20 n.10); rather, it refers to Rule 41(b) to determine whether the diversity judgment is "upon the merits" and then refers to state law to determine the preclusive effect of such a judgment. A recognizing state court does the same.

[5] *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 4441, at 372-73 (1981 & 2000 Supp.) [hereinafter "Wright & Miller"]; Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 782-83 (1986); Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 320-21 & n.113 (1993).

ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace' . . . ." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917); *see also Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (same).

The traditional rule is that "dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations." 18 Wright & Miller, *supra*, § 4441, at 369; *see also* Restatement (Second) of Judgments § 19 (1982), Reporter's Note to cmt. f ("[T]he prevailing rule" is that "[t]he dismissal operates as a bar in the jurisdiction in which it is rendered, . . . [b]ut the dismissal does not preclude an action in another jurisdiction if that jurisdiction would apply a statute of limitations that has not yet run."); Restatement (Second) of Conflict of Laws § 142(2) & cmt. g, § 143 (1971); Restatement (Second) of Conflict of Laws § 110, cmt. a (1988 rev.). Under full faith and credit principles, where the first forum (like California) does not accord preclusive effect to a limitations dismissal, neither may the second. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 384 (1985); *Union & Planters' Bank v. Memphis*, 189 U.S. 71, 75 (1903). This is true whether the preclusion in question is deemed to be issue or claim preclusion. The quest to serve "full faith and credit principles" (PLAC Br. 17-19) therefore favors Semtek's argument, not Lockheed's.

The traditional rule finds justification in the limits of the choice-of-law process: from the perspective of claim preclusion, a party like Semtek did not have the opportunity to rely on Maryland limitations law in the California action; from the perspective of issue preclusion, the timeliness of Semtek's action under Maryland law was neither litigated nor decided in the California action. Lockheed contends that the traditional rule regarding the interjurisdictional effect of limitations dismissals is "outdated," Lockheed Br. 32 n.20, but the rule is a matter of substantive policy, to be re-examined and reconsidered by the

states as they see fit. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988). It is not a matter to be decreed by a Federal Rule of Civil Procedure.

Preclusion law reflects important public policy choices and legal conceptions, such as the understanding of the nature of a "claim." *E.g.*, *Commissioner v. Sunnen*, 333 U.S. 591, 597-98 (1948); *Townsend v. Jemison*, 50 U.S. (9 How.) 407, 413 (1850); *Bank of the United States v. Donnally*, 33 U.S. (8 Pet.) 361, 370 (1834). The ability of states to adopt different rules regarding the res judicata effects of limitations dismissals serves important principles of federalism. By way of illustration, if Semtek's limitations dismissal in California had occurred in state court (where the complaint was originally filed) rather than in federal court (where it was removed by Lockheed), Semtek's action in Maryland would now be permitted to proceed. Hence, this very case underscores the sweeping effect on state law and principles of federalism entailed by the creation of a federal law of preclusion in diversity cases. That is why *Dupasseur* is instructive regarding the proper construction of Rule 41(b), and why Lockheed errs in relegating its discussion of *Dupasseur* to the last few pages of its brief. *Hanna v. Plumer*, 380 U.S. 460 (1965), itself opined that "in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, [a court] need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts." *Id.* at 473.[6]

The Rules Enabling Act was never intended to provide rulemaking authority with respect to intrinsically substantive matters involving important public policy choices. *See* 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."). For example, a 1926 Senate Judiciary

[6] *Hanna*, of course, did not involve the preclusive effect of a diversity judgment, but only whether service of process should be made in the manner prescribed by state law or that set forth in Rule 4(d)(1) – an issue that "would be of scant, if any, relevance to the choice of a forum." 380 U.S. at 469.

Committee report addressing a direct antecedent of the Rules Enabling Act – whose text remained essentially unchanged from its initial proposal in 1924 until its enactment in 1934 – explained that, "[i]n view of the express provision inhibiting the court from affecting 'the substantive rights of any litigant,' any court would be astute to avoid an interpretation which would attribute to the words 'practice and procedure' an intention on the part of Congress to delegate a power to deal with . . . substantive rights or remedies." S. Rep. No. 1174, 69th Cong., 1st Sess. 11 (1926). The rulemaking power would not extend to "matters involving substantive and remedial rights affected by considerations of public policy," *id.* at 9:

> Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function. And it is inconceivable that any court will hold that rules which . . . put an end to a good cause of action, as in the case of a limitation or abatement of an action . . . are merely filling "up the details," even though they relate to remedial rights.

Id. at 11. A 1928 Senate Report repeated that "[i]t cannot be emphasized too strongly that the general rules of court contemplated under this bill will deal only with the details of the operation of the judicial machine." S. Rep. No. 440, 70th Cong., 1st Sess. 16 (1928).

Preclusion law has always been deemed to be too substantive to be incorporated in the federal rules of civil procedure. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1128 (1982) (quoting Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 59 (1977)). Thus, the original Advisory Committee rejected as exceeding its authority a strongly urged suggestion that the class action rule should include a provision as to the preclusive effects of a judgment on persons not parties to the action. *See* Burbank,

130 U. PA. L. REV. at 1164 n.637. The Advisory Committee's decision was "due to the feeling that such a matter was one of substance and not one of procedure." James W. Moore & Marcus Cohn, *Federal Class Actions – Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 556 (1938).

Moreover, although Rule 14 originally included a provision on preclusive effects, the Committee deleted the provision in 1946 as beyond the rulemaking power. The 1946 amendment deleted the following sentence: "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff, or to the third-party plaintiff." The 1946 Advisory Committee Notes to Rule 14 explain that the sentence was "stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. *It is not the purpose of the rules to state the effect of a judgment.*" (emphasis added).

Similarly, a 1985 House Report on a bill that became 1988 legislation governing federal court rulemaking (Pub. L. 100-702, 102 Stat. 4648) stated that the House did not intend to "confer power on the Supreme Court to promulgate rules regarding matters, such as limitations and preclusion, that necessarily and obviously define or limit rights under the substantive law." H.R. Rep. No. 422, 99th Cong., 1st Sess. 21 (1985) (incorporated in section-by-section analysis of H.R. Rep. No. 889, 100th Cong., 2d Sess. 29 (1988)). A letter by the Chief Justice during consideration of the 1988 legislation recognized that "[t]he Judicial Conference and its committees on rules have participated in the rules promulgation process for over a half century. During this time they have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter." Letter from Hon. William H. Rehnquist to Hon. Peter W. Rodino, Jr. (Oct. 19, 1988), *reprinted in* 134 Cong. Rec. H10,430, H10,441 (daily ed. Oct. 19, 1988).

Accordingly, a noted scholar has concluded that the judiciary "lacks the power 'to promulgate rules regarding . . . limitations and preclusion.'" Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1033 (citation omitted). The history of federal rulemaking demonstrates that Rule 41(b) should not be construed as determining the preclusive effect of a limitations dismissal. To the extent it were read to have such a meaning, Rule 41(b) would be invalid – a point that, contrary to Lockheed's argument, is encompassed by the second question presented, as Semtek noted in its Petition for Certiorari at 28 n.22.

Rather than calling into question the legitimacy of Rule 41(b), this Court should follow the simpler path of construing the rule, in accordance with its text, as not addressing the question of preclusion law presented by this case. This Court has recognized the established practice of "interpret[ing] the Federal Rules . . . with sensitivity to important state interests and regulatory policies" and of "avoid[ing] conflict with important state regulatory policies." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7, 438 n.22 (1996). In *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-52 (1980), for example, this Court construed Federal Rule 3 as not determining when a diversity action commences for the purposes of tolling the state statute of limitations. In *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943), this Court interpreted Federal Rule 8(c) as relating only to a matter of pleading and not to the burden of proof. Lockheed admits that neither *Walker* nor *Palmer* "gave the Federal Rule an unnecessarily expansive interpretation extending beyond its plain text and into the sphere occupied by a state rule." Lockheed Br. 26-27. Lockheed contends that this principle is inapposite here because there is no plausible alternative interpretation to Lockheed's overly ambitious reading of Rule 41(b) (Lockheed Br. at 27-28), but that contention is wrong. Rule 41(b) is better interpreted as a procedural rule affording a datum that the federal court regards its decision as "on the merits," for whatever

significance that has under the preclusion law of the applicable jurisdiction.

C. Lockheed's Interpretation of Rule 41(b) Would Produce Uncertainty

According to Lockheed, "Rule 41(b) preserves the discretion of district courts to specify that a dismissal is 'without prejudice' precisely to permit case-specific tailoring of a dismissal's preclusive effect." Lockheed Br. 24 n.11. Lockheed identifies no constraint on the rendering court's discretion to decide whether or not its dismissal will be "upon the merits." Indeed, constraints on the court's discretion would be unavailable because they would have to be located in the governing background principles of law that Lockheed contends have been swept aside by Rule 41(b). Lockheed even touts as an advantage the fact that, under its proposal, "the parties normally will not know in advance" what preclusive effect the federal judgment will have. Lockheed Br. 37. Compare PLAC Br. 21-22 (preclusion rule should provide "much-needed certainty," "a clear answer," and "predictability').

Lockheed thus interprets Rule 41(b) as a vast charter for discretionary decisionmaking in *all* cases, not just those involving limitations dismissals in diversity cases – a charter for policy choices that were never presented to Congress to review and that are shielded, according to Lockheed's view of *Hanna*, from the principles of federalism. Rule 41(b) would authorize a rendering federal court to prescribe not merely whether it regards its decision as "on the merits" but also the legal significance of that order as a matter of res judicata law. Lockheed suggests that this extraordinary result is not problematic so long as only the rendering court (and not the recognizing court) retains such freewheeling discretion. Lockheed Br 18-19. Lockheed is wrong. In describing the "uniform rule" (*United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950)), and "inflexible doctrine" of res judicata (*Wong Doo v. United States*, 265 U.S. 239, 241 (1924)), this Court has never suggested that the res judicata effect of federal judgments is to be

left to the discretion of individual district courts – whether the rendering *or* the recognizing courts.[7]

II. THE LAW OF THE FORUM STATE CONTROLS THE PRECLUSIVE EFFECT OF A FEDERAL DIVERSITY JUDGMENT

Ultimately, this is a case about federalism, not about Federal Rule 41(b). The argument that the rule of *Dupasseur* is an artifact of the Conformity Act (Lockheed Br. at 46-49) ignores the authoritative scholarship of Professor Burbank, *supra*, 71 CORNELL L. REV at 741-62, which establishes that the preclusion rules applied by the federal courts followed the source of the substantive law applied by the rendering court.[8] The emphasis on the source of the substantive law is also unmistakable in *Deposit Bank v. Frankfort*, 191 U.S. 499, 515-16 (1903) (describing *Dupasseur* as applying to cases "wherein the court derives its jurisdiction from the citizenship of the parties and in the exercise of the jurisdiction to administer the laws of the State where the proceedings are had"), and *Bigelow v. Old Dominion*

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[7] Ironically, under Lockheed's approach the district court in this case – had it been apprised of the full context in which it was acting – likely would have exercised its discretion to make plain that its dismissal precluded only the repleading and refiling of the complaint in California, and not a subsequent action in Maryland. *See* App. 65a, 71a & n.17.

[8] Lockheed quotes selectively from *Dupasseur* (committing the same error as Professor Degnan, *see* Burbank, *supra*, 71 CORNELL L. REV. at 749) and omits *Dupasseur*'s critical language that state res judicata law governed because the rendering federal court derived "its jurisdiction solely from the citizenship of the parties [and] was in the exercise of jurisdiction to administer the laws of the State" – not merely that "its proceedings were had in accordance with the forms and course of proceeding in the State courts." 88 U.S. at 135. As Professor Burbank has noted, the concept of "administering" state law is a clear reference to the Rules of Decision Act. *See* Burbank, *supra*, 71 CORNELL L. REV. at 749-50 n.65. In addition, the drafter of the headnotes in *Dupasseur* was Justice Bradley, the author of the Court's opinion, and headnote 3 leaves little doubt that the decision rested on the Rules of Decision Act rather than on the Conformity Act. 22 L. Ed. 588 (1875).

Copper Mining & Smelting Co., 225 U.S. 111, 129-30 (1912) (noting that federal court was "administer[ing]" state law).[9]

A. State Interests

The rule of *Dupasseur* vindicates important principles of federalism and diversity jurisdiction that are reflected in the *Erie* doctrine. Without the rule of *Dupasseur*, variations in state preclusion law would be overridden whenever federal courts sat in diversity, creating opportunities for forum shopping and risking inequitable administration of the laws.[10] "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

Lockheed tries to deny the important interests of federalism at issue by arguing that there is uncertainty regarding California preclusion law. Lockheed Br. 30-32. But the systemic values served by the rule of *Dupasseur* do not depend on the particular circumstances of this case. This Court need not delve into California preclusion law in order to reverse the judgment below

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[9] The issue in *M'Cormick v. Sullivant*, 23 U.S. (10 Wheat.) 192, 199 (1825) (cited at PLAC Br. 13 & n.6), was whether a federal diversity judgment was void for lack of subject-matter jurisdiction. Whether uniform federal law may determine the validity of federal judgments (see note 1, *supra*) says nothing about whether federal law controls the preclusive effect of judgments deemed valid under federal law.

[10] PLAC cites the elimination of these variations as reason to abandon *Dupasseur*. PLAC Br. 11 (federal "uniform answer" is preferable to state-law "patchwork"). But variation in substantive law (which res judicata is) is the essence of federalism and does not justify replacing state law with a federal straitjacket. *E.g.*, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). PLAC's claim that federal res judicata law would be less "unsettled" than state law (PLAC Br. 21) is beside the point and in any event unsupported by caselaw showing that the res judicata law of each state is at least as clear as that within the federal system. *See* Semtek Opening Br. 26.

and allow the meaning of California law to be decided by the Maryland courts on remand. Further, as the case comes to this Court, it has been assumed that a statute-of-limitations dismissal by a California state court does not foreclose suit in another forum offering a longer statute of limitations. App. 31a. The question presented stated that California preclusion law "would not impose a res judicata bar to the Maryland action," Petition for Certiorari at i, and Lockheed never disputed this statement in its brief in opposition and in fact conceded the point in the Maryland Circuit Court.[11]

In any event, Lockheed's description of California law is inaccurate. *Koch v. Rodlin Enterprises*, 273 Cal. Rptr. 438 (Ct. App. 1990), held that "a summary judgment granted on the grounds that the action is barred by the statute of limitations does not act as res judicata to preclude a subsequent action." *Id.* at 441. Even within California, a limitations dismissal has only issue-preclusive effect.[12]

Lockheed notes that the California decision in *Koch* was *intrajurisdictional* in nature – i.e., it concerned the ability of the plaintiff to bring a subsequent lawsuit within California itself. That is entirely unremarkable. Indeed, one would not expect California to seek to dictate the extraterritorial effect of its judgments. *Cf. Baker v. General Motors Corp.*, 522 U.S. 222

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[11] *See* Tr. Oral Arg. at 16 (statement by Lockheed's counsel that, if the dismissal had been rendered by a California state court, "we would be arguing that the Court should give res judicata to that," but "we would be on the short end of that stick, to be perfectly candid with you").

[12] *See also Johnson v. City of Loma Linda*, 5 P.3d 874, 878, 884 (Cal. 2000) (dismissal of state sex discrimination claim based on laches does not bar subsequent federal suit); *Lackner v. LaCroix*, 602 P.2d 393, 395 (Cal. 1979) ("dismissal on limitations grounds is in no way dependent on nor reflective of the merits"); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (9th Cir.) ("a judgment based on the statute of limitations regarding a cause of action in one suit is not necessarily res judicata in a second suit, which pleads a different cause of action based on the same core of underlying facts"), *cert. denied*, 525 U.S. 963 (1998).

(1998). Lockheed's argument, in fact, proves our point: Lockheed's position (and the decision of the Maryland courts under review) necessarily gives greater effect to a federal diversity judgment than would be given to an identical judgment rendered by the state court in California, because (according to Lockheed) the federal judgment has *interjurisdictional* preclusive effects, while the California judgment does not. The proper analysis would respect the prerogatives of both California and Maryland by recognizing that California does not accord claim-preclusive effect to its limitations dismissals, that even if it did Maryland would be free as a matter of full faith and credit to permit suit on the same claim under its longer statute of limitations, and that Maryland has decided not to adopt a borrowing statute applying the statutes of limitations of other jurisdictions.

B. Federal Interests

There are no federal interests sufficient to displace state law with respect to the question presented by this case concerning the preclusive effect of a diversity judgment. To be sure, as *Dupasseur* acknowledged, the interpretation of a federal judgment is ultimately a federal question. 88 U.S. at 134-35. But "knowing whether 'federal law governs' . . . does not much advance the ball." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994). Even if this Court were to adopt a federal common law of preclusion that would trump *Erie* – and there are sound reasons to decline to do so – that federal common law should borrow state res judicata rules. *See* 18 Wright & Miller, *supra*, § 4472, at 734 (citing 1 Restatement (Second) of Judgments § 87 (1981)); Restatement (Second) of Conflict of Laws § 95 cmt. h (1988 rev.) ("When a federal judgment adjudicates claims under State law, State law, as a matter of federal law, may determine the effects of the judgment.").

Thus, federal law determines what substantive law a diversity court applies but mandates use of state substantive law (28 U.S.C. § 1652), including state statutes of limitations, *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), and state choice of law

rules, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), despite concerns that such an approach "would yield a patchwork of conflicting rules." PLAC Br. 11. *See also University of Tennessee v. Elliott*, 478 U.S. 788, 798-99 (1986) (articulating federal common-law rule to "serve[] the value of federalism" that federal courts must give the factfinding of a state agency acting in a judicial capacity the same preclusive effect to which it would be entitled in the state's courts). *See generally* Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1552-71 (1992).

The federal interest in the stability of federal court judgments is satisfied by the basic obligation of respect for federal judgments. It may also be the case that this interest requires uniform federal rules governing validity and finality (see note 1, *supra*) and a procedure (as provided by Rule 41(b)) for identifying those federal judgments regarded as being "upon the merits" for whatever significance governing background law may attribute to them. *See* Burbank, *supra*, 71 CORNELL L. REV. at 764-65, 780-81 n.226, 782-83, 793. Any remaining federal interest does not justify creating an entire body of federal res judicata law to govern diversity judgments.

Indeed, PLAC concedes that *Deposit Bank v. Frankfort* "can be read to suggest that the federal interests in a federal-court diversity judgment, as opposed to a judgment on a federal question, do not justify *creating* a federal-common-law rule of preclusion." PLAC Br. 16 n.7. The forum state (as supplier of the substantive law to be applied) has a stronger interest than the federal government in the outcome of most preclusion questions. In this case, for example, California has an interest in not having the effect of its statute of limitations stretched beyond what the state itself would provide. Further, any federal interest is contingent, because any subsequent litigation may occur (as here) in the courts of another state rather than in federal court.[13]

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[13] In this case, for example, both Semtek complaints were filed in state court. As the California federal court observed, "if the federal court system

PLAC's claim that federal law is needed for uniformity's sake (PLAC Br. 19-22) falls flat in light of the concession that Rule 41(b) does not supply the answer for all (or even a majority) of preclusion questions. *E.g.*, Lockheed Br. 36 (state law controls the res judicata effect of diversity judgments with respect to "the scope of the claims or causes of action precluded or the rules governing mutuality or privity of the parties"). Contrary to the suggestion at PLAC Br. 10-11, there is always power as a matter of federal common law to check or override any idiosyncratic feature of state law that is hostile to or discriminates against a particularized federal interest.[14] Not surprisingly, the authorities cited by Lockheed (Lockheed Br. 34-35) in fact express reservations about its argument.[15]

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is to be burdened by two successive federal actions in this matter, the burden will be caused by Lockheed's successive removals, not Plaintiff's successive state court complaints." App. 69a n.13.

[14] *Cf. Felder v. Casey*, 487 U.S. 131, 150-53 (1988) (federal law displaces state notice-of-claim statute); *Testa v. Katt*, 330 U.S. 386, 393-94 (1947) (state may not discriminate against federal law). *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962) (cited at Lockheed Br. 34-36), involved a dismissal for failure to prosecute a suit in federal court. The specialized federal interest implicated by penalty dismissals provides no support for the wide-ranging proposition endorsed by Lockheed that "[t]he same logic extends to all dismissals under Rule 41(b)." Lockheed Br. 36. In fact, penalty dismissals may be invoked only "in extreme circumstances," Richard H. Field *et al.*, CIVIL PROCEDURE 1144 (1997) (internal quotation omitted), and present an atypical example of a compelling federal interest.

[15] Professor Erichson states that, "[a]dmittedly, the *Erie* question is a close one. If we emphasize the federal interest in federal court litigation procedures, as I suggest is appropriate . . . federal law prevails. If we emphasize forum-shopping concerns and vertical uniformity, state law prevails." Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 1008 (1998). Professor Lilly states that the Federal Rules "[p]robably" do not "operate directly to dictate their res judicata consequences in other courts" and "under one view, could not, without running afoul of the Enabling Act." Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 320-21 & n.113 (1993).

C. Forum Shopping

In addition to serving the interests of federalism, honoring the Rules of Decision Act, and preventing the inequitable administration of state law, *Dupasseur* also prevents forum shopping. When they arise, preclusion issues often determine whether a lawsuit is dead or alive. Thus, while forum shopping will not occur in every case, it would be naive to pretend that the danger does not exist. PLAC's very appearance as an *amicus* in this case suggests that it recognizes the opportunities for forum shopping.

Lockheed's own conduct illustrates the danger. Lockheed removed the California action to federal court and then lodged a proposed judgment with the federal court specifying that the dismissal was "on the merits" – language that the district court had not used in its order of May 5, 1997. App. 58a. Lockheed thereby sought to transform a non-merits limitations dismissal into a federal judgment claiming full res judicata effect.[16]

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[16] Lockheed also unsuccessfully attempted to remove the Maryland action to federal court and to have the federal court in California enjoin the Maryland state-court action. Lockheed moved to transfer the Maryland action to California, but withdrew its motion after the California federal court indicated that it was not "obvious that res judicata would apply to bar Plaintiff's Maryland state court action." App. 65a. The Maryland Circuit Court did not deny that "Lockheed was the only party shopping for the federal forum." *Id.* 45a. By contrast, Semtek filed suit in Maryland after "additional investigation by Semtek revealed that much of the alleged tortious conduct occurred in Maryland." *Id.* 37a. Semtek cited a variety of Maryland contacts, including events that occurred in Maryland, documents originating there, and five current as well as two former Lockheed executives who were resident in Maryland. *See* Affidavit of Steven C. Shuman in Opposition to Motion to Transfer in *Semtek International Incorporated v. Lockheed Martin Corp.*, No. CCB-97-2386 (D. Md.). Semtek's choice of the Maryland forum was thus dictated by the location of witnesses and evidence.

III. EVEN IF RULE 41(b) CONTROLLED, IT WOULD NOT ACCORD PRECLUSIVE EFFECT TO LIMITATIONS DISMISSALS

Petitioner's primary position is that Rule 41(b) does not control this case because it does not embody a federal law of res judicata. Even under Lockheed's interpretation of Rule 41(b), however, the judgment below should be reversed because limitations dismissals are preliminary rather than on the merits under *Costello v. United States*, 365 U.S. 265 (1961). Lockheed claims that such a result is too disruptive to contemplate because *Costello*'s construction of Rule 41(b) applies to federal question as well to diversity cases. But Lockheed ignores the fact that even preliminary dismissals are entitled to issue-preclusive effect. Restatement (Second) of Conflict of Laws § 110, cmt. b (1988 rev.). Thus, a federal question case like *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (concerning claims under § 10(b) of the Securities Exchange Act), unlike a limitations dismissal in a diversity case, does not involve the possibility of a subsequent suit in a different forum applying a different law. Hence, the preclusive effect of a limitations dismissal in the federal question context is as a practical matter more extensive (simply by virtue of the nature of the plaintiff's claims) than in the context of a diversity suit founded on state law.

Lockheed's predictions of disruption are refuted by real-world experience. The traditional rule has long permitted a subsequent action in a different forum after a limitations dismissal. *See* Part I-B, *supra*. No ill effects have been shown. Although Lockheed contends that this rule has been superseded by the Restatement (Second) of Conflict of Laws (1988 rev.) (Lockheed Br. 32 n.20), that contention is incorrect. Section 110, comment a of the 1988 revision provides that "[a] judgment for the defendant is also *not on the merits* if it is based on the ground that the plaintiff's action is barred by the forum's statute of limitations . . . ." (emphasis added). *See also* § 110, cmt. b.

Lockheed contends that *Costello* is confined to "curable

defects," Lockheed Br. 42, but the language of the decision is not so limited. *Costello* held that Rule 41(b) was intended to incorporate the "common-law principle" that "dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." 365 U.S. at 285-86. One aspect of this "common-law" principle was the traditional rule regarding the limited effect of limitations dismissals on subsequent actions in different forums. The linkage is confirmed by the reference to limitations dismissals (in Restatement of Judgments § 49, cmt. a (1942)) in the 1963 Advisory Committee notes concerning the amendment of Rule 41(b). Moreover, limitations dismissals often are "curable" in the sense that new evidence may come to light regarding, for example, fraudulent concealment (as in *Koch v. Rodlin Enterprises*, 273 Cal. Rptr. at 440), or a plaintiff may "cure" the defect by bringing a new suit in a different forum with a longer limitations period – just as a plaintiff may cure a dismissal for improper venue by filing a new suit in a new court as Rule 41(b) expressly contemplates.[17]

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[17] Lockheed's argument is less a claim that limitations dismissals should be deemed to be "upon the merits" than it is a choice-of-law objection to the traditional rule allowing each forum state to apply its own statute of limitations, so that issue preclusion does not prevent subsequent lawsuits. The solution to this "problem" – if it is one – is not to mischaracterize Rule 41(b) but rather to adopt the kinds of choice of law principles reflected in Restatement (Second) of Conflict of Laws § 142 (1988 rev.), and the Uniform Conflict of Laws Limitations Act, 12 U.L.A. 46-49 (Supp. 1983). *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.10 (1984).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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No. 99-1551

IN THE

Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. RULE 41(b) BARS PETITIONER'S EFFORT TO RELITIGATE A DISMISSED FEDERAL LAWSUIT	3
A. The Perceived Difference Between Rule 41(b) and California Preclusion Law Is the Animating Force Behind This Dispute.	3
B. A Statute of Limitations Dismissal Is Not a "Dismissal for Lack of Jurisdiction"	4
II. FEDERAL FULL FAITH AND CREDIT PRINCIPLES DIRECT STATE COURTS TO APPLY THE PRECLUSION LAW OF THE RENDERING COURT, NAMELY RULE 41(b)	9
A. Federal Law Dictates Which Body of Preclusion Law a Recognizing State Court Should Apply	9
B. *Dupasseur* and Other Cases Decided Before the Adoption of the Federal Rules Do Not Dictate the Application of California Preclusion Law.	12
C. The Law of Full Faith and Credit, Common Sense, and Sound Policy All Support Applying the Preclusion Law of the Rendering Court, Namely Rule 41(b)	17
CONCLUSION	24

TABLE OF AUTHORITIES

Cases:	Page:
Antoncic v. Baltimore & Ohio R. Co., 47 F.2d 97 (3d Cir. 1931)	15
Armstrong v. Carson's Executors, 1 Fed. Cas. 1140 (C.C.D. Pa. 1794)	19
Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912)	14
Bohenik v. Delaware & Hudson Co., 49 F.2d 722 (2d Cir. 1931)	16
Bohus v. Beloff, 950 F.2d 919 (3d Cir. 1991)	7
Bowen v. City of New York, 476 U.S. 467 (1986)	5
Costello v. United States, 365 U.S. 265 (1961)	5, 6, 7
Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter House & Live-Stock Landing Co., 120 U.S. 141 (1887)	12, 14
DeBerry v. First Gov't Mortgage and Inv. Corp., 170 F.3d 1105 (D.C. Cir. 1999)	6
Deposit Bank of Frankfort v. Board of Councilmen of the City of Frankfort, 191 U.S. 499 (1903)	11, 16
Dupasseur v. Rochereau, 88 U.S. 130 (1874)	*passim*
Elliot v. City of Union City, 25 F.3d 800 (9th Cir. 1994)	5
Embry v. Palmer, 107 U.S. 3 (1883)	13
Federated Department Stores, Inc. v. Moitie, 452 U.S. 394 (1981)	4, 7
Follette v. Wal-Mart Stores, Inc., 41 F.3d 1234 (8th Cir. 1994)	9
Gelb v. Royal Globe Ins. Co., 798 F.2d 38 (2d Cir. 1986)	19
Green v. Van Buskirk, 72 U.S. 307 (1866)	19

TABLE OF AUTHORITIES—Continued

	Page
Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900)	12, 13
Hanna v. Plumer, 380 U.S. 460 (1965)	8
Heck v. Humphrey, 512 U.S. 477 (1994)	11
Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962)	9
Koch v. Rodlin Enters., Inc., 223 Cal. App. 3d 1591 (1990)	3
Kovacs v. Brewer, 356 U.S. 604 (1958)	18
Leavell v. Kieffer, 189 F.3d 492 (7th Cir. 1999)	5
McCormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825)	13, 23
Metcalf v. City of Watertown, 153 U.S. 671 (1894)	11, 13, 15
Mills v. Duryee, 11 U.S. (7 Cranch) 481 (1813)	19
Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935)	10
Nevada Power Co. v. Monsanto Co., 955 F.2d 1304 (9th Cir. 1992)	6
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)	5, 7
Riley v. New York Trust Co., 315 U.S. 343 (1942)	18
Santiago Hodge v. Parke Davis & Co., 909 F.2d 628 (1st Cir. 1990)	7
Shoup v. Bell & Howell Co., 872 F.2d 1178 (4th Cir. 1989)	4
Sibbach v. Wilson & Co., 312 U.S. 1 (1941)	8
65 Butterfield v. Chicago Title Ins. Co., 70 Cal. App. 4th 1047 (1999)	6
Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410 (3d Cir. 1999)	6
Stoll v. Gottlieb, 305 U.S. 165 (1938)	11, 13

TABLE OF AUTHORITIES—Continued

	Page
Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)	22
Tullock v. Mulvane, 184 U.S. 497 (1902)	14
United States v. Oppenheimer, 242 U.S. 85 (1916)	5
United States v. Zucca, 351 U.S. 91 (1956)	6
West Side Belt R.R. Co. v. Pittsburgh Construction Co., 219 U.S. 92 (1911)	11, 23
Constitutional Provisions, Statutes, and Rules:	
U.S. Const. Art. IV, § 1	*passim*
28 U.S.C. § 1257	12
28 U.S.C. § 1332(a)	22
28 U.S.C. § 1738	*passim*
42 U.S.C. § 1983	21
Fed. R. Civ. P. 41(b)	*passim*
Other Authorities:	
P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (3d ed. 1988)	10
Restatement (Second) Judgments § 87	16
J. Story, *Commentaries on the Constitution* (M. Bigelow, ed., 5th ed. 1891)	18

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC"), is a non-profit corporation with 127 corporate members representing a broad cross-section of American industry. Its corporate members include manufacturers and sellers in a wide range of industries, from automobiles to electronics to pharmaceutical products. A list of PLAC's current corporate membership is attached as Appendix A. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

PLAC's primary purpose is to file *amicus curiae* briefs in cases with issues that affect the development of product liability law and have potential impact on PLAC's members. PLAC has submitted numerous *amicus curiae* briefs in both state and federal courts, including this Court. PLAC members engage in substantial litigation in both state and federal courts. PLAC members, therefore, have a strong interest in uniform, predictable, and workable rules of preclusion and full faith and credit. Petitioner's proposed rule would undermine the predictability and rationality of preclusion principles. Accordingly, PLAC submits this brief in support of Respondent.[1]

SUMMARY OF ARGUMENT

This case turns on whether a state court should judge the preclusive effect of a prior federal-court diversity judgment based on the law of the rendering forum (Fed. R. Civ. P. 41(b)) or the law of the State where the federal court sits (in this case, California). Rule 41(b) clearly bars Petitioner's

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[1] Both Petitioner and Respondent have consented to the filing of this brief. No counsel representing a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation and submission of this brief.

attempt to relitigate its dismissed lawsuit in state court. Although Petitioner contends that a dismissal on statute of limitations grounds falls within Rule 41(b)'s exception for dismissals for lack of jurisdiction, this Court's cases are to the contrary. Under Rule 41(b), a dismissal of a claim as time-barred, no less than a dismissal for failure to state a claim, constitutes a preclusive adjudication "upon the merits."

Petitioner attempts to escape the reach of Rule 41(b) by suggesting that this Court's precedents direct a recognizing state court to apply the preclusion law of the State where the federal court sits, rather than Rule 41(b). However, federal full faith and credit law requires a recognizing court to apply the preclusion law of the rendering court. This Court's precedents do not support a contrary rule. Before the adoption of the Federal Rules, a federal court sitting in diversity applied the preclusion law of the State where it sat to determine the preclusive effect of its own judgments. Accordingly, this Court's direction to state courts to judge the preclusive effect of federal-court diversity judgments by applying state law was a direction to apply the law of the rendering court. Certainly, none of these cases suggests that the recognizing court should apply a body of law that conflicts with the preclusion rules of the rendering court. Yet that is the rule that Petitioner asks this Court to adopt.

This Court should reject Petitioner's proposed rule and adopt the federal full faith and credit rule that applies in every other context—namely, that a recognizing court must apply the preclusion law of the rendering forum. This simple rule protects successful plaintiffs and defendants alike and promotes judicial economy, predictability, and finality. It does not require overruling precedents or making the Federal Rules directly applicable in state court. This rule puts federal-court diversity judgments on the same footing as the judgments of every other court in the United States by giving

them the same preclusive effect in every court that they have in the rendering court.

ARGUMENT

I. RULE 41(b) BARS PETITIONER'S EFFORT TO RELITIGATE A DISMISSED FEDERAL LAWSUIT

A. The Perceived Difference Between Rule 41(b) and California Preclusion Law Is the Animating Force Behind This Dispute.

Petitioner contends that California law deems a dismissal on statute of limitations grounds "a technical or procedural, rather than a substantive, termination" that does not bar a subsequent suit invoking a cause of action subject to a longer limitations period. *See, e.g., Koch v. Rodlin Enters., Inc.*, 223 Cal. App. 3d 1591, 1597 (1990) (holding that the dismissal of the first action as time-barred under the statute of limitations for contract rescission did not preclude a second action "based on common law fraud which allegedly was discovered within the applicable limitations period"). According to Petitioner, had a California *state* court dismissed Petitioner's suit as time-barred and had Petitioner then filed a second suit in the same state court raising a claim with a longer limitations period, the first judgment would not bar the second suit under California law. By routine application of the Full Faith and Credit Act, 28 U.S.C. § 1738, the same result would obtain if the second suit were filed in federal court, because the federal court would apply the preclusion law of the rendering court.

In this case, of course, Petitioner's first suit was dismissed as time-barred by a *federal* court. If Petitioner had refiled in that same federal court (*i.e.*, the rendering court), the federal court would have applied Fed. R. Civ. P. 41(b) to determine the "[e]ffect" of its prior "[i]nvoluntary [d]ismissal."

Rule 41(b) provides that "[u]nless the court in its order for dismissal otherwise specifies, . . . any dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates *as an adjudication upon the merits*." None of these three exceptions applies, and the California district court, in dismissing Petitioner's first suit as time-barred, did not "specif[y]" that its order would not have preclusive effect. *Id.* To the contrary, the court went out of its way to specify that the case was dismissed "in its entirety on the merits and with prejudice." Pet. App. at 59a. Accordingly, had Petitioner refiled in federal court, the court would have held that its first dismissal constituted an "adjudication upon the merits," and dismissed the second suit. Fed. R. Civ. P. 41(b); *see, e.g., Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). It was Petitioner's election to bring its second suit in a new forum and the question whether the recognizing court should look to the law of the rendering forum (Rule 41(b)) or California law that led to this Court's review on *certiorari*.

B. A Statute of Limitations Dismissal Is Not a "Dismissal for Lack of Jurisdiction."

Petitioner objects that even if Rule 41(b) applies, it would not have barred a second action in the rendering court because, *inter alia*, the dismissal of Petitioner's first action should be treated as a "dismissal for lack of jurisdiction." As such, the dismissal would fall within one of Rule 41(b)'s exceptions and would not constitute a dismissal "upon the merits."

The plain language of Rule 41(b) provides the most formidable obstacle to Petitioner's argument. *See, e.g., Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180 (4th Cir. 1989) ("The plain language of [Rule 41(b)] indicates that the dismissal of plaintiffs' Pennsylvania action on statute of

limitations grounds is an adjudication on the merits."). Had the rule intended to except dismissals of time-barred cases, it would have said so explicitly. It does not, and dismissals on this ground have never been construed as jurisdictional. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 478 (1986) (holding that the statutory requirement that suit must be filed within 60 days of Secretary's denial of disability benefits "is not jurisdictional, but rather constitutes a period of limitations"); *Leavell v. Kieffer*, 189 F.3d 492, 494 (7th Cir. 1999) ("Neither does a statute of limitations affect the district court's jurisdiction."); *Elliot v. City of Union City*, 25 F.3d 800, 801 n.1 (9th Cir. 1994) ("The statute of limitations is not jurisdictional, however, but an affirmative defense.").

Indeed, this Court has labeled a dismissal on statute of limitations grounds as a judgment on the merits. In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), this Court noted that "[t]he rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: *as a judgment on the merits*." *Id.* at 228 (emphasis added). *Plaut* cited Rule 41(b) and this Court's unanimous opinion in *United States v. Oppenheimer*, 242 U.S. 85 (1916), as support. *Oppenheimer* held that "a judgment for the defendant upon the ground that the prosecution is barred goes to his liability as a matter of substantive law, and one judgment that he is free as a matter of substantive law is as good as another." *Id.* at 87.

Undeterred by these precedents, Petitioner contends that *Costello v. United States*, 365 U.S. 265 (1961), supports treating a dismissal on statute of limitations grounds as jurisdictional. However, whatever elasticity *Costello* introduced into the term "jurisdiction," that term cannot be stretched to include a dismissal on statute of limitations grounds. In *Costello*, the first action was dismissed because

the government's complaint did not include an affidavit of good cause, which was a statutory "prerequisite to the initiation of denaturalization proceedings." 365 U.S. at 268. The lack of the required affidavit was apparent on the face of the complaint and barred the court's consideration of the merits of the case. *See id.* at 285 (observing that the filing of the affidavit was a "precondition requisite to the Court's going forward to determine the merits of [the] substantive claim"); *United States v. Zucca,* 351 U.S. 91, 100 (1956) (holding that "the District Attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause").

In contrast to the lack of an affidavit of good cause (which prevents the suit, *ab initio*, from going forward), the applicability of a statute of limitations is neither facially obvious nor inherently preliminary. Indeed, just the opposite is true. "When the applicability of the statute of limitations is in dispute, there are usually factual questions as to when a plaintiff discovered or should have discovered the elements of its cause of action." *Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd.,* 181 F.3d 410, 425 (3d Cir. 1999). "[R]esolution of the statute of limitations issue is normally a question of fact." *65 Butterfield v. Chicago Title Ins. Co.,* 70 Cal. App. 4th 1047, 1054 (1999) (citation omitted). Courts often cannot resolve statute of limitations defenses until deep into the litigation (especially, for example, when fraudulent concealment or latent injury issues are raised). *See, e.g., DeBerry v. First Gov't Mortgage and Inv. Corp.,* 170 F.3d 1105, 1110-11 (D.C. Cir. 1999) ("we find that the district court erred in dismissing the claims before appropriate discovery could be conducted"); *Nevada Power Co. v. Monsanto Co.,* 955 F.2d 1304, 1307-10 (9th Cir. 1992) (reversing summary judgment based on statute of limitations).

As the issue of accrual "may be decided as a matter of law only when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct," *id.* at 1307 (quotation omitted), the statute of limitations cannot be analogized to "a precondition requisite to the Court's going forward to determine the merits of [the] substantive claim." *Costello,* 365 U.S. at 285. Nor does the statute of limitations spare the defendant "the inconvenience of preparing to meet the merits." *Id.* at 286. Indeed, in many cases a statute of limitations defense cannot be resolved before or apart from the substantive merits of the case. *See, e.g., Bohus v. Beloff,* 950 F.2d 919, 924-30 (3d Cir. 1991) (reversing judgment n.o.v. and reinstating jury's verdict that found no limitations bar); *Santiago Hodge v. Parke Davis & Co.,* 909 F.2d 628, 633 (1st Cir. 1990) (holding that the limitations issue was "for the jury" and affirming jury's verdict).

Petitioner's suggestion that this Court extend *Costello* to adopt a per se rule that dismissals on statute of limitations grounds always are jurisdictional makes no sense, in light of the fact that such dismissals often occur deep into the litigation. To be sure, in some cases (like Petitioner's first suit) the statute of limitations defect will be clear from the outset, and the court will dismiss the complaint early in the litigation. But the same is true of any legal defect, including defects such as the failure to state a claim, which indisputably result in a judgment on the merits. *Moitie*, 452 U.S. at 399; *Plaut,* 514 U.S. at 228. In any event, Rule 41(b) gives judges discretion to avoid rendering a dismissal on the merits with preclusive effect where appropriate. In contrast, under Petitioner's strained reading of Rule 41(b), a dismissal on statute of limitations grounds would *never* have preclusive effect, even if entered after the defendant had incurred the expense and inconvenience of presenting a full defense.

Accordingly, if Rule 41(b) applies in this case, it clearly bars Petitioner's effort to relitigate its previously dismissed federal claims in state court. When Petitioner opted to file its successor suit in a Maryland state court, that court had to decide what law determined the preclusive effect, if any, of the dismissal of Petitioner's first suit. If Rule 41(b) applies, then the Maryland court correctly dismissed Petitioner's suit.[2]

The Maryland courts held that Rule 41(b) requires giving *res judicata* effect to the federal-court dismissal. There is, however, more than one route to that conclusion. Respondent argues that Rule 41(b) has "the force of a federal statute," *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941), and "cover[s] the point in dispute," *Hanna v. Plumer*, 380 U.S. 460, 470 (1965). Consequently, Respondent submits that Rule 41(b) itself directs the Maryland courts to afford *res judicata* effect to the federal-court dismissal.

Petitioner's argument that this Court should begin its analysis with full faith and credit principles leads to the same conclusion. As demonstrated *infra*, applicable federal full faith and credit principles direct the Maryland courts to apply the law of the rendering court. The rendering federal court would judge the preclusive effect of its own prior judgment by applying Rule 41(b) and would give *res judicata* effect to the dismissal of a time-barred claim as "an adjudication upon

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[2] The outcome is less clear if California law applies. Petitioner contends that California law permits a plaintiff to refile dismissed claims in a jurisdiction that applies a longer statute of limitations to those claims. Respondent suggests that the result under the law of California is unclear. If (contrary to our submission) Petitioner is correct that California law applies, sorting out the exact content of California law presumably is a task for the Maryland state courts on remand. However, the fact that the parties disagree as to the content of California's preclusion law underscores the uncertainty and unpredictability fostered by Petitioner's proposed rule.

the merits." Fed. R. Civ. P. 41(b). A Maryland court, applying the law of the rendering court, should do likewise.

II. FEDERAL FULL FAITH AND CREDIT PRINCIPLES DIRECT STATE COURTS TO APPLY THE PRECLUSION LAW OF THE RENDERING COURT, NAMELY RULE 41(B)

A. Federal Law Dictates Which Body of Preclusion Law a Recognizing State Court Should Apply.

Neither the Full Faith and Credit Clause of the Constitution, the Full Faith and Credit Act, 28 U.S.C. § 1738, nor Rule 41(b) directly addresses the question here: what law should a state court apply to determine the preclusive effect of an earlier federal-court judgment. The Full Faith and Credit Clause, by its terms, addresses a state court's consideration of the preclusive effect of the "judicial proceedings" of another State. Art. IV, § 1. The Full Faith and Credit Act, enacted pursuant to Congress' power under the Full Faith and Credit Clause, addresses both a state court's consideration of the preclusive effect of a prior decision of another State and a federal court's consideration of a prior state-court decision. In addition, Rule 41(b) appears to address the preclusive effect of a prior federal-court judgment in a second federal court.[3]

Federal law, therefore, squarely addresses three of the four full faith and credit scenarios possible in the federal system of concurrent jurisdiction. The Constitution deals with the state court-then-state court scenario; the statute covers the state

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[3] There is, however, some confusion on this point in the lower courts. *Compare Kern v. Hettinger*, 303 F.2d 333, 339-40 & n.7 (2d Cir. 1962) (applying Rule 41(b)) *with Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234, 1237 (8th Cir. 1994) (applying state law).

court-then-federal court scenario; Rule 41(b) directly addresses the federal court-then-federal court situation. However, neither the Constitution, statute, nor rule expressly covers the scenario presented here: a state court's consideration of the preclusive effect of a prior federal-court judgment.

Despite this gap, federal law must provide a uniform answer. There is a clear federal interest in having the courts of every State give a uniform answer to the initial question of what body of preclusion law governs the effect of a prior federal-court decision. Were this initial question a matter of state law, then state courts would be free to apply their own preclusion principles to ignore the preclusive effect of the previous judgment. For example, Maryland could take the position that any federal judgment adverse to a citizen of Maryland lacks preclusive effect in the Maryland courts. The same federal interests that animate the Full Faith and Credit Clause and statute surely prevent this result. A constitutional structure that features federal and state courts with concurrent jurisdiction demands a uniform rule. *See, e.g., Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935). Respectfully, States should not be allowed free rein to determine the effect, if any, of a prior federal judgment. *See* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 1603 (3d ed. 1988) ("There is no explicit constitutional or legislative text providing that the preclusive effect of federal judgments in state courts should be measured by federal law. But such a rule is indispensible to federalism. . . .") (quotation omitted).[4]

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[4] The need for a uniform federal answer is particularly acute because the same gap in full faith and credit principles that exists for federal-court diversity judgments also exists for federal-court judgments on federal questions. Although neither the Constitution nor the Full Faith and Credit Act expressly addresses what effect a state court should give a prior federal-court judgment on a federal question, this Court has indicated that federal law provides the answer. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994). The same result should apply in diversity cases.

Diversity jurisdiction could not long co-exist with a regime in which States were free to choose whether to apply their own state-law preclusion principles, the preclusion principles of the rendering court, or those of the State where the federal court is located. Such a regime would yield a patchwork of conflicting rules. Strong federal interests demand that federal law supply a uniform answer to the question of what law applies to determine the preclusive effect of a prior federal-court judgment.[5]

By asserting authority to review state-court decisions that allegedly failed to give full effect to federal-court judgments, this Court declined to leave state courts to their own devices in determining the preclusive effect of such judgments. In *Dupasseur v. Rochereau*, 88 U.S. 130 (1874), for example, this Court rejected the suggestion that it lacked jurisdiction to review the Louisiana Supreme Court's decision concerning the preclusive effect of the prior federal-court judgment. *See id.* at 134-35 ("We cannot hesitate, therefore, as to our jurisdiction to hear the case."). Likewise, in *West Side Belt R.R. Co. v. Pittsburgh Construction Co.*, 219 U.S. 92, 102 (1911), this Court classified "the question whether due faith and credit were given [by the state court] to the judgment of the [federal] circuit court," as "a Federal question." *Accord Deposit Bank of Frankfort v. Board of Councilmen of the City*

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[5] Although the federal law that supplies this answer might be described most accurately as federal common law, it also could be considered a gloss on the Full Faith and Credit Act, *see, e.g., Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938), or as arising from "[p]rovisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective," *id.*; *accord Metcalf v. City of Watertown*, 153 U.S. 671, 676 (1894).

of Frankfort, 191 U.S. 499, 515 (1903) (holding that "whether a Federal judgment has been given due force and effect in the state court is a Federal question").

In *Dupasseur* and a host of subsequent cases, this Court based its jurisdiction on a party's claim that, by denying the asserted effect of a prior federal-court judgment, the state court denied a "right, privilege, or immunity [that] is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257. *Accord Hancock Nat'l Bank v. Farnum*, 176 U.S. 640, 641 (1900) (noting that for the Court to have jurisdiction there must be "some alleged denial of a right or immunity secured by [the] Constitution"); *Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter House & Live-Stock Landing Co.*, 120 U.S. 141, 146 (1887).

These cases mark a clear path. Federal law should control the Maryland court's choice of preclusion law. The only remaining question is whether federal law dictates the application of the preclusion principles of the rendering court, or some other body of law.

B. *Dupasseur* and Other Cases Decided Before the Adoption of the Federal Rules Do Not Dictate the Application of California Preclusion Law.

Petitioner suggests that *Dupasseur* definitively answered the question before the Court and requires the application of California preclusion law. However, *Dupasseur* did not pose, let alone answer, the question presented here. *Dupasseur* and its progeny simply did not confront situations, like this, where the federal court applies a different rule of preclusive effect than that of the State where the federal court sits.

Instead, the disputes in those earlier cases fell into two categories. First, many cases involved efforts by state courts to give federal-court diversity judgments *less* effect than

equivalent state-court judgments. This Court repeatedly rejected such efforts to "discriminat[e] between judgments rendered in the courts of a state and those rendered in the federal courts held in the same state" by giving the federal judgments less weight. *Metcalf*, 153 U.S. at 677 (reversing Wisconsin Supreme Court's decision subjecting actions to enforce federal-court judgments to a more stringent statute of limitations than actions to enforce Wisconsin judgments); *see also Stoll*, 305 U.S. at 177 (reversing Illinois Supreme Court's refusal to give *res judicata* effect to federal-court judgment in a bankruptcy proceeding); *Hancock National Bank*, *supra* (reversing Rhode Island Supreme Court for failing to give judgment of federal court in Kansas the same preclusive effect as Kansas court's judgment); *Embry v. Palmer*, 107 U.S. 3, 19 (1883) (reversing Connecticut Supreme Court for failing to give *res judicata* effect to a judgment of a District of Columbia court); *cf. Deposit Bank of Frankfort*, *supra* (reversing Kentucky court's refusal to give preclusive effect to a prior federal-court judgment on a federal question). These cases reflect the long-established principle that federal courts "are all of limited jurisdiction; but they are not, on that account, inferior Courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded." *McCormick v. Sullivant*, 23 U.S. (10 Wheat.) 192, 199 (1825).[6]

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[6] *McCormick v. Sullivant* appears to undermine Petitioner's theory of this case. In this early case, the Court reviewed a state-court determination of the preclusive effect of a prior federal-court diversity judgment. The plaintiff-in-error argued that the prior federal judgment lacked preclusive effect because the pleadings in that case failed to show diversity of citizenship. The Court considered this contention (presumably a question of federal law because state courts do not impose diversity requirements) and rejected it on the merits. However, under Petitioner's theory, the Court should have dismissed this attack as irrelevant on the ground that the federal-court judgment had the same

The second category of these early cases involved disputes over the content of the law of the State where the federal court sat. In these cases, the parties took it for granted that state law provided the relevant preclusion law. Their dispute was over the content and effect of that state law—*i.e.*, whether state law afforded preclusive effect to a particular prior judgment. In *Dupasseur*, for example, the principal question before the Court was whether the prior federal-court action was *in rem* or *in personam*. The plaintiff in the subsequent state-court proceeding was not a party to the federal-court action. Accordingly, under Louisiana law, the federal-court action provided a defense in the second action only if the first action was *in rem*. The parties disputed whether Louisiana law treated the first action as *in rem*, but no one suggested that a different preclusion rule would apply because a federal court issued the judgment. *See also Crescent City Live-Stock*, *supra* (determining that prior federal-court judgment precluded a subsequent claim under Louisiana law for malicious prosecution); *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 130 (1912) (discussing, in dictum, a question of New York preclusion law).

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preclusive effect as a judgment of an Ohio state court, and lack of diversity provides no basis to attack an Ohio state-court judgment. The Court's willingness to consider this issue on the merits is instructive because, in the Conformity Act era, this jurisdictional issue represented one of the few issues of federal law that could have affected the preclusive effect of a federal-court diversity judgment. Likewise, in other contexts where federal law provided a distinct rule, this Court did not hesitate to ensure that state courts did not impute collateral consequences to federal-court judgments that were inconsistent with federal law. *See, e.g., Tullock v. Mulvane*, 184 U.S. 497 (1902) (refusing to permit the recovery of attorneys' fees in a state-law action arising out of an earlier federal-court injunction because the Conformity Act did not cover a federal court's equitable orders and federal law prohibited an award of attorneys' fees).

None of those cases answers the question of whether a recognizing court should apply the law of the rendering court or the law of the State where the federal court sits when the two bodies of law would provide different answers. Indeed, such a situation did not arise in these cases because there was no federal law of preclusion akin to Rule 41. The Court issued these decisions against a background assumption (no longer true in light of the Federal Rules) that federal courts sitting in diversity functioned in all relevant respects like state courts and applied the preclusion rules of the State where they sat. *See, e.g., Metcalf*, 153 U.S. at 680. This assumption was critical to the Court's statements that federal-court judgments were to be treated no differently than state-court judgments. For example, in *Dupasseur*, this Court observed that the federal court's "proceedings were had in accordance with the forms and course of proceedings in the State courts. It is apparent, *therefore*, that no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the State courts in a like case and under similar circumstances." 88 U.S. at 135 (emphasis added).

Petitioner relies on *Dupasseur* for the proposition that the Maryland court should have applied a body of preclusion law (California's) *different than that applied by the rendering court* (Rule 41(b)). Yet *Dupasseur* and the cases that followed *all applied the preclusion law of the rendering court*. Not one of the decisions supports the application of a law other than the law of the rendering court. It is only that, before the promulgation of Rule 41, the law of the rendering federal court *was* the law of the State where the federal court sat. Indeed, at the time of *Dupasseur*, had a plaintiff refiled the same action in the same federal court that had just dismissed it, the *federal* court would have evaluated the preclusive effect of its first decision under the law of the *State* where it sat. *See, e.g., Antoncic v. Baltimore & Ohio R. Co.*,

47 F.2d 97 (3d Cir. 1931) (applying Pennsylvania law); *Bohenik v. Delaware & Hudson Co.*, 49 F.2d 722 (2d Cir. 1931) (A. Hand, J.) (applying New York law); *see generally* Restatement (Second) Judgments § 87 cmt. a. As a result, the pre-Rule 41(b) cases could not have looked to any other law but state law.

Rule 41(b) changed all this. With the advent of the Federal Rules in general and Rule 41(b) in particular, federal courts sitting in diversity apply different "forms and . . . proceedings," *Dupasseur*, 88 U.S. at 135, and different preclusion law. A federal court sitting in diversity applies federal law (Rule 41(b)) that dictates a different result when considering the preclusive effect of its prior judgment. Accordingly, *Dupasseur*, which is premised on a functional equivalence between a federal court sitting in diversity and a state court, cannot be read to dictate the result in a case, like this, where the federal courts employ different "forms and . . . proceedings" and different preclusion rules.[7]

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[7] *Deposit Bank of Frankfort* supports this conclusion. That decision distinguished *Dupasseur* as not applying to a federal-court judgment on a federal question and applied federal law to determine the effect of a prior federal-court judgment on a federal question. The Court had no occasion to consider a situation in which a federal diversity court would have applied a different preclusion rule than that applied by the state courts. However, even though the Conformity Act covered federal courts considering federal questions, the Court perceived a special rule of federal law (presumably, federal common law) that entitled a federal-court decision on a federal question to greater weight than a state-court decision. Accordingly, where federal law applied a specific preclusion rule, this Court did not hesitate to apply federal law, rather than the conflicting state law. *See* 191 U.S. at 514-17; *see also supra* n.6. The same principle should control this case. To be sure, *Deposit Bank of Frankfort* can be read to suggest that the federal interests in a federal-court diversity judgment, as opposed to a judgment on a federal question, do not justify *creating* a federal-common-law rule of preclusion. However, that does not justify *ignoring* existing positive federal

In sum, the authorities on which Petitioner relies never framed, let alone answered, the critical question in this case—should a state court confronted with a federal-court judgment decide the preclusive effect of that judgment based on the rules of the rendering forum or the different rules applied in the State where the federal court sits. *Dupasseur* does not answer this question for the Court. This Court must confront and answer this question as a matter of first impression.

C. The Law of Full Faith and Credit, Common Sense, and Sound Policy All Support Applying the Preclusion Law of the Rendering Court, Namely Rule 41(b).

Although the question before this Court is one of first impression, once the question is properly framed, discerning the correct answer is not terribly difficult. In a choice between deciding the preclusive effect of a prior judgment based on the law of the court that rendered it or the different law of a forum that did not render the decision, the latter option has little to recommend it. On the other hand, applying the law of the rendering court, *i.e.*, the law that would have applied had plaintiff refiled in the same court rather than in a state court on the other side of the country, is eminently reasonable. It comports with full faith and credit principles. It makes common sense. It serves sound policy.

First, the principles of full faith and credit support applying the law of the rendering court. The basic thrust of those principles is to give judicial and legislative acts the full faith and credit—no more, no less—that they would have in the rendering forum. As Justice Story emphasized, the framers "intended to give, not only faith and credit to the public acts,

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preclusion law, like Rule 41(b). To the contrary, *Deposit Bank of Frankfort* supports the application of federal preclusion law when there is federal preclusion law to apply.

records, and judicial proceedings of each of the States . . . ; but to give to them *full* faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them be denied, any more than in the State where they originated." 2 J. Story, *Commentaries on the Constitution* § 1310 at 191 (M. Bigelow, ed., 5th ed. 1891) (emphasis in original) (footnote omitted).

This principle protects a successful plaintiff by ensuring that it can enforce a judgment even in a different jurisdiction. The principle also protects a successful defendant by denying the plaintiff an advantage from refiling an unsuccessful action in a different forum. "It was the purpose of the Full Faith and Credit Clause to preclude dissatisfied litigants from taking advantage of the federal character of the Nation by relitigating in one State issues that had been duly decided in another. The clause was thus designed to promote a major policy of the law: that there be certainty and finality and an end to harassing litigation." *Kovacs v. Brewer*, 356 U.S. 604, 611 (1958) (Frankfurter, J., dissenting).

Full faith and credit principles protect against the risk "that questions and titles, once deliberately tried and decided in one State, should be open to litigation again and again, as often as either of the parties, or their privies, should choose to remove from one jurisdiction to another." Story, *supra*, at § 1309 at 190. As this Court observed in *Riley v. New York Trust Co.*, 315 U.S. 343, 348 (1942): "This clause of the Constitution brings to our Union a useful means for ending litigation." It prevents litigants from renewing "their legal battles whenever they m[e]et in other jurisdictions," and "compels that controversies be stilled." *Id.* at 349.

When a court is confronted with a judgment rendered by another court, full faith and credit principles make the law of the rendering court the logical reference point. The second

court should judge the validity and preclusive effect of the first judgment based on the law of the rendering court.[8] As Justice Wilson concluded in one of the Nation's first full faith and credit cases, "the record shall have the same effect in this Court, as in the Court from which it was taken." *Armstrong v. Carson's Executors*, 1 Fed. Cas. 1140, 1140 (C.C.D. Pa. 1794).[9] This is true in the state-then-state context, *see, e.g., Green v. Van Buskirk*, 72 U.S. 307, 310-11 (1866), in the state-then-federal context, *see, e.g., Mills*, 11 U.S. (7 Cranch) at 485, and the federal-then-federal context, *see, e.g., Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 41-42 (2d Cir. 1986). It should be no less true in the federal-then-state context presented in this case. Accordingly, when a state court is confronted with a prior federal judgment, it should look to Rule 41(b), which provides the governing law in the rendering forum.

Petitioner's proposed alternative, requiring the second court to look to the state law of California, makes no sense as a practical matter. This would force the second court to

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[8] It bears emphasis that just because a state court applies the *law of the rendering forum* to judge the preclusive effect of a federal-court diversity judgment, it does not follow that *federal law* will control every aspect of the preclusion analysis. On some questions, such as the effect of a judgment "upon the merits" on attempts to relitigate the same claim, federal law provides a definitive answer. On other questions, the law of the rendering federal court in diversity remains the law of the State where the federal court sits, just as it was on *almost* every question under the Conformity Act. *Cf. supra* n.6.

[9] Justice Story made a similar point in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813). He noted that "when congress gave the *effect of a record to the judgment it gave all the collateral consequences*. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and *such proof is of as high a nature as an inspection, by the Court, of its own record*, or as an exemplification would be in any other Court of the same state." *Id.* (emphasis added).

construct a completely artificial scenario. The court would need to ask how a hypothetical California state court would have treated a hypothetical second suit if, *contrary to fact*, the first suit had been adjudicated in California state court. The law of preclusion is difficult enough. There is no justification for substituting this strained, counterfactual inquiry for the question normally asked by the full faith and credit analysis–what preclusive effect does the rendering court give to its own judgment.[10]

Applying the law of the rendering forum respects the policies of the rendering forum and avoids unintended results. For example, if a State had two parallel court systems with concurrent jurisdiction over certain disputes but different preclusion rules (for example, where a juvenile court and a court of general jurisdiction shared jurisdiction over a statute, but the juvenile court permitted reopening judgments as a matter of course), what preclusion rule should a recognizing court use to judge the preclusive effect of a judgment by one of these courts? Should the subsequent court apply the preclusion rule of the court that actually rendered the decision? Or should it apply the rule of the other court that did not adjudicate the first dispute, but adjudicates similar questions under different circumstances? It would make absolutely no sense to hold a juvenile forever bound by a

[10] The logic of Petitioner's position suggests that state law should determine the preclusive effect of a federal-court diversity judgment, whether the recognizing forum is a state court or another federal court. This produces the anomaly of forcing the federal courts to ignore Rule 41(b), even though both the rendering and recognizing courts are federal courts bound by Rule 41(b). On the other hand, if the applicable preclusion rule depends on whether the second action is filed in state or federal court, then Petitioner's rule encourages forum shopping and further undermines predictability. A proper analysis avoids these anomalies by looking to the law of the rendering court (Rule 41(b)), no matter where the second case is filed.

juvenile-court judgment or an adult free to reopen a prior judgment from the court of general jurisdiction. It makes no more sense to ignore Rule 41(b) and deny preclusive effect to a federal-court judgment based on the preclusion law applicable in California state courts, but that is precisely the rule that Petitioner proposes.[11]

Applying the law of the rendering forum also promotes important federal policies. First and foremost, applying the law of the rendering forum provides much-needed certainty. Rule 41(b) dictates a clear answer to the preclusive effect of a federal-court judgment by outlining clear default rules. In the context of dismissals on statute of limitations grounds, Rule 41(b) makes clear that such dismissals are presumptively dismissals on the merits that preclude further litigation. To be sure, a district court can deviate from the default rules by clearly stating that a judgment will not have preclusive effect. But that also provides certainty. Rule 41(b) guarantees certainty as to the preclusive effect of the first litigation at the end of the first litigation. Petitioner's proposed rule creates uncertainty by making the preclusive effect of federal-court judgments turn on a Maryland court's resolution of unsettled principles of California law. *See supra* n.2.

Rule 41(b) furthers the goal of certainty by encouraging the rendering court to address expressly the preclusive effect of

[11] A uniform federal-law rule also would avoid awkward results when a federal court adjudicates a federal-question claim together with a supplemental state-law claim. For example, many plaintiffs bring related state-law claims in addition to claims under 42 U.S.C. § 1983, and because state law supplies the statute of limitations for § 1983 claims, the § 1983 claim and the state-law claims often are subject to the same statute of limitations. Where a federal-law claim and a state-law claim arise out of the same facts and are dismissed in the same judgment as barred by the same statute of limitations, it would make no sense to hold that the preclusive effect of that federal-court judgment was governed by two different laws.

its judgment. The district court in California took advantage of that opportunity and made it unmistakably clear that it dismissed the case "in its entirety on the merits and with prejudice." Pet. App. 59a.

Petitioner's proposed rule would undermine the predictability provided by Rule 41(b). No matter how clearly a federal court indicated that a judgment disposed of the case "upon the merits," the ultimate preclusive effect would turn on often-murky questions of state law. Rather than allowing the rendering court to address the preclusive effect of its judgment, Petitioner would judge the decision's preclusive effect on the basis of the law of a different court (law that the federal court would not even have jurisdiction to apply).

Applying the law of the rendering court also promotes the legitimate federal interest in preventing the relitigation of cases that have consumed scarce federal judicial resources. Federal courts ration the scarce resource of diversity jurisdiction by enforcing amount-in-controversy, 28 U.S.C. § 1332(a), and complete diversity requirements, *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). Rule 41(b) likewise recognizes that federal-court jurisdiction is a scarce resource that should not be squandered. If a case satisfies the requirements for diversity jurisdiction and a federal court adjudicates the case "on the merits," that should be conclusive.

Finally, it bears emphasis that affirming the Maryland court's decision to look to the law of rendering court requires neither a finding that Rule 41(b) applies in state court proceedings, nor the overruling of *Dupasseur*. As noted, the federal law of full faith and credit requires a state court to look to the law of the rendering court to determine a judgment's preclusive effect. It was clear long before the promulgation of Rule 41(b) that federal full faith and credit principles apply to limit a state court's treatment of prior federal-court judgments. *See, e.g., West Side Belt R.R. Co.*,

219 U.S. at 102; *McCormick*, 23 U.S. (10 Wheat.) at 199. Federal full faith and credit principles require state courts to apply the law of the rendering forum, which is Rule 41(b). But Rule 41(b) is not operating directly in state court, any more than California preclusion law is operating directly in Maryland court under Petitioner's proposed rule.

Equally important, applying Rule 41(b) where it supplies the preclusion law of the rendering court in no way requires the Court to overrule *Dupasseur*. *Dupasseur* and the cases following it all applied the law of the rendering court (then, state law) to judge the preclusive effect of a prior federal-court judgment. That underlying principle has not changed. What has changed is the preclusion law applied by the rendering federal court. While federal courts formerly applied state preclusion principles, they now apply Rule 41(b).

Requiring state courts to apply Rule 41(b) to judge the preclusive effect of federal-court diversity judgments respects rather than undermines the basic teaching of *Dupasseur*. The central theme of *Dupasseur* is that a federal-court diversity judgment is entitled to the same respect as other decisions. This Court repeatedly invoked its jurisdiction to ensure this equality of treatment. The law of the rendering court determines the preclusive effect of the judgments of every other court in the United States. Applying that same rule to federal-court diversity judgments ensures that they do not receive less weight than other judgments, but rather *full* faith and credit.

CONCLUSION

For the foregoing reasons, and those expressed in Respondent's Brief, this Court should affirm the judgment below.

Respectfully submitted,

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October 10, 2000

APPENDIX

APPENDIX A

CORPORATE MEMBERS, PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M

Allegiance Healthcare Corporation

American Home Products Corporation

American Medical Systems, Inc.

American Suzuki Motor Corporation

Andersen Corporation

Andrx Corporation

Anheuser-Busch Companies, Inc.

Appleton Papers, Inc.

Aventis Pharmaceuticals

BASF Corporation

Baxter International, Inc.

Bayer Corporation

BIC Corporation

Biomet, Inc.

Biro Manufacturing Company Inc.

Black & Decker (U.S.) Inc.

BMW of North America, Inc.

Boeing Company, The

Bombardier Inc., Recreational Products

Bridgestone/Firestone, Inc.

Briggs & Stratton

Brown and Williamson Tobacco Company

Brown-Forman Corporation

Budd Company, The

C. R. Bard, Inc.

Caterpillar, Inc.

Chevron Corporation

CLARK Material Handling Company

Coleman Company, Inc., The

Compaq

Continental General Tire, Inc.

Coors Brewing Company

DaimlerChrysler Corporation

Dana Corporation

Deere & Company

Dow Chemical Company, The

DuPont

E. & J. Gallo Winery

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Estee Lauder Companies

Euclid Hitachi Heavy Equipment, Inc.

Exxon Mobil Corporation

FMC Corporation

Ford Motor Company

Freightliner Corporation

Gates Corporation, The; Stant Corporation

General Electric Company

General Motors Corporation

Georgia-Pacific Corporation

Glaxo Wellcome Inc.

Global Industrial Technologies, Inc.

Goodyear Tire & Rubber Company, The

Great Dane Limited Partnership

Guidant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Heil Company, The

Henkel Corporation

Honda North America, Inc.

Hyundai Motor America

International Paper Company

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Joseph E. Seagram & Sons, Inc.

Kawasaki Motors Corp., U.S.A.

Kolcraft Enterprises, Inc.

Kraft Foods, Inc.

Lucent Technologies Inc.

Makita USA, Inc.

Mack Trucks, Inc.

Mazda (North America), Inc.

Medtronic, Inc.

Melroe Company

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motors R. & D. of America, Inc.

Motor Coach Industries International, Inc.

Navistar International Transportation Corp.

Niro Inc.

Nissan North America, Inc.

O. F. Mossberg & Sons, Inc.

Otis Elevator Co.

PACCAR Inc

Panasonic Company

Pentair, Inc.

Pfizer Inc.

Philip Morris Companies, Inc.

Polaris

Porsche Cars North America, Inc.

Procter & Gamble Co., The

Raymond Corporation, The

Raytheon Aircraft Company

Rheem Manufacturing

RJ Reynolds Tobacco Company

Rover Group, Ltd.

Schindler Elevator Corp.

SCM Group USA, Inc.

Sears, Roebuck and Company

Shell Oil Company

Sherwin-Williams Company, The

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Solutia Inc.

Sturm, Ruger & Co., Inc.

Subaru of America

Synthes (U.S.A.)

Textron Inc.

Thomas Built Buses, Inc.

Toro Company, The

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Whirlpool Corporation

Wilbur-Ellis Company

Wilson Trailer Company

Yamaha Motor Corporation, U.S.A.